Hopkins, Brian <bhopkins@blm.gov>

Fwd: [EXTERNAL] Fwd: Glenwood Springs Letter to BLM June 12 with Attachments.pdf

Larry Sandoval <lsandoval@blm.gov> Thu, Jun 13, 2019 at 8:17 AM
To: Brian Hopkins <bhopkins@blm.gov>, h50johns@blm.gov
Cc: Andrew Archuleta <aarchule@blm.gov>

I don't know that they will necessarily reach out to either of you as my acting (identified in my out of office message), but please defer any inquiries to Andrew.

Thanks!

LS

Sent from my iPhone

Begin forwarded message:

From: Larry Sandoval <lsandoval@blm.gov>
Date: June 12, 2019 at 11:09:51 PM MDT
To: Andrew Archuleta <aarchule@blm.gov>, h50johns@blm.gov
Subject: Fwd: [EXTERNAL] Fwd: Glenwood Springs Letter to BLM June 12 with Attachments.pdf

Andrew - Here's the latest from the City and the attorney that I think is jointly representing them and the Citizens Alliance.

We'll follow the lead of you and Jamie, but I think getting our letter to the City by early next week and really solid on RMR's ability to produce other materials while we complete the DCV will be important. I will provide my thoughts on a couple of your combined edits tomorrow. Assuming we'll also want to get Danielle's critical review too!

LS

btw - Attorney Matt Ward is the one that tried claiming during the DC call that BLM was non responsive to the FOIA request.

Sent from my iPhone

Begin forwarded message:

From: Matt Ward <matt.ward@strategiesdc.com>
Date: June 12, 2019 at 9:46:16 PM MDT
To: "blm_co_statedirector@blm.gov" <blm_co_statedirector@blm.gov>, "lsandoval@blm.gov" <lsandoval@blm.gov>, "mleveret@blm.gov" <mleveret@blm.gov>
Subject: [EXTERNAL] Fwd: Glenwood Springs Letter to BLM June 12 with Attachments.pdf

Hello Jaime, Mitchell and Larry - Glenwood Springs is ready to work with BLM. But they are loaded for bear, like Teddy Roosevelt was at the Hotel Colorado long ago. We should talk before June 20th. Can you please call before then?
Matt Ward, 202.422.2411

Matt Ward, 202.422.2411

-------- Original message --------
From: Debra Figueroa <debra.figueroa@cogs.us>
Date: 6/12/19 7:33 PM (GMT-05:00)
To: Jonathan Godes <jonathan.godes@cogs.us>
Cc: Karl Hanlon <kjh@mountainlawfirm.com>, Matt Ward <matt.ward@strategiesdc.com>
Subject: FW: Glenwood Springs Letter to BLM June 12 with Attachments.pdf

Dear State Director Connell, Field Director Sandoval, BLM Assistant Director Leverette, and BLM Division Chief Elser,

I wanted to share this letter with you ahead of our upcoming meeting with State Director Connell and Field Director Sandoval on June 20th. I greatly appreciate your time and consideration on this topic which is critically important to the City of Glenwood Springs. Please let Debra Figueroa know if you have any questions on the attached letter since I am sharing it ahead of our meeting so we can further discuss it at that time. You can reach her at (970-309-2494) or debra.figueroa@cogs.us.

Thank you again and I look forward to talking further.

Mayor Jonathan Godes

Email to:

blm_co_statedirector@blm.gov

lsandoval@blm.gov

mleveret@blm.gov

aelser@blm.gov

Copy:

Dustin_Sherer@gardner.senate.gov

Betsy_Bair@gardner.senate.gov

John_Whitney@bennet.senate.gov

Patrick_Donovan@bennet.senate.gov

jonathan_davidson@bennet.senate.gov

Liz.Payne@mail.house.gov

matt.ward@strategiesdc.com

kjh@mountainlawfirm.com

Debra.figueroa@cogs.us

From: Matt Ward <matt.ward@strategiesdc.com>
Sent: Wednesday, June 12, 2019 4:05 PM
To: Jonathan Godes <jonathan.godes@cogs.us>; Debra Figueroa <debra.figueroa@cogs.us>; Karl J. Hanlon <karl.hanlon@cogs.us>
Cc: Roger Flynn <wmap@igc.org>; Jeff Peterson <Jeff@tramway.net>
Subject: Glenwood Springs Letter to BLM June 12 with Attachments.pdf
Importance: High

Hi Mayor and all – Here is a letter, with everybody's input except yours Johnathan, for you as Mayor to send to the Bureau of Land Management in preparation for the June 20 meeting with CO State Director Jaime Connell and others. It has all of the agreed-upon attachments too.

Make sure to put an email cover on this letter that makes clear that the City would like BLM to read this letter before you meet on June 20.

Don't have time today, but tomorrow I will send a suggested cover letter from Mayor Godes to Secretary Bernhardt that would accompany this packet. Will also send Jeff/GSCA and copy y'all on an email template for activating the GCSA members in advance of the June 20 BLM.

Thanks all for this great effort! Matt Ward

Attachment

2 attachments

noname.html
1K

Glenwood Springs Letter to BLM June 12 with Attachments.pdf
1530K

June 12, 2019

U.S. Department of Interior
Bureau of Land Management

Re: June 20, 2019 Meeting with City of Glenwood Springs on Illegal Mid-Continent Mine Operations

Dear Colorado State Director Connell, Field Director Sandoval, BLM Assistant Director Leverette, and BLM Division Chief Elser:

I, along with other officials with the City of Glenwood Springs, look forward to our upcoming meeting with State Director Connell and BLM officials on June 20th. In order to make that meeting as productive as possible, we submit this letter as a supplement to our May 23, 2019 letter, in which we detailed our serious concerns with the ongoing operations at RMR's Mid-Continent Mine. In that letter, we requested, among other issues, that BLM commence full enforcement actions at the quarry with respect to its unauthorized use, extraction, and sale of common variety minerals for road, construction aggregate, and other unauthorized uses, in violation of RMR's Plan of Operations ("PoO") and federal law. **The City of Glenwood Springs respectfully but strongly requests again now that the Colorado BLM office commence that enforcement, including on the basis that RMR is extracting and selling common variety minerals in violation of their authorization.**

As we detailed in the City's May 23 letter, along with supporting evidence, we believe that RMR continues to mine, process, and sell common variety minerals from the quarry without the required Mineral Materials Sales contracts, appropriate permits, or payment of royalties. For example, according to RMR's website, "RMR produces a variety of limestone products that are used in everything from underground mine safety, to stream restoration and local infrastructure projects. In fact, RMR was a significant material supplier on the Grand Avenue Bridge project, which was just completed in 2017." https://glenwoodrocks.org/about-us/ (viewed June 10, 2019). We plan to bring additional evidence to our June 20 meeting with you, showing that RMR has recently sold substantial amounts of such materials to the Colorado Department of Transportation, at what appears to be the lowest prices on the market.

Despite admitting that the rock produced from the quarry is used for stream restoration (rip-rap) and road/bridge construction, RMR asserts that the quarry rock can still be mined and permitted as a locatable mineral under the 1872 Mining Law, as the previous companies were authorized to do pursuant to BLM's approval of the original and amended Plans of Operation. However, "The [Interior] Department has consistently held that materials suitable only for fill purposes, for road base or for comparable purposes are not locatable under the mining laws." United States v. Bienick, 14 IBLA 290, 293 (1974).

RMR maintains that these minerals should still be considered by BLM to be locatable minerals regardless of the end uses of the sold product. RMR believes that, even if the rock produced from the quarry is used and sold for common variety purposes, such as road base, rip-rap, and construction aggregate, its operation still qualifies as a locatable mineral operation, as opposed to a common variety/mineral material mine. That is wrong.

Under established Interior Department precedent, and BLM's own previous determinations regarding this quarry, a mine is no longer considered a locatable mineral operation if the end uses of the minerals are for common variety purposes. This is true regardless of whether the minerals from the mine were originally considered locatable based on previous end uses. In this case, although the quarry originally produced chemical-grade limestone for coal dust suppression and other qualifying end uses, those uses are no longer applicable. Instead, as the evidence shows, the end uses for the rock produced by the quarry are for common variety purposes.

One leading and recent Interior Department case squarely held that if the end uses of the mined material change from qualifying (e.g., coal dust suppression) to non-qualifying (the current end uses of aggregate, road use, etc.), then the mineral is no longer considered locatable and any production and sale of rock for non-qualifying uses must be governed under the Mineral Material regulations. In United States v. Armstrong, 184 IBLA 180, 2013 WL6631451 (2013), the Interior Board of Land Appeals ruled that, although the mined mineral (pumice) was once considered locatable due to its distinct and special value based on previous market uses, due to changed market conditions and the resulting change in end use, the mineral was no longer considered locatable and the claims no longer valid under the 1872 Mining Law and 1955 Common Varieties Act.

To determine whether the pumice was a locatable mineral, the IBLA appropriately applied the test set forth in McClarty v. Sec'y of the Interior, 408 F.2d 907, 908 (9th Cir. 1969), and codified at BLM's regulations, 43 C.F.R. § 3830.12(b), to distinguish between common varieties (unlocatable) and uncommon varieties (locatable) of materials. In Armstrong, the evidence showed that the market for the previously-qualifying end use for the pumice no longer existed, and as such, the mineral was no longer locatable. In a fact pattern very similar to the RMR quarry, the Board noted that the fact of previous qualifying end uses was irrelevant as to whether the ***current*** operations qualified as mining of a valuable locatable mineral deposit under the Mining Law.

> [E]vidence of past success in extracting and marketing a mineral from a mining claim is of limited evidentiary value—a mining claim cannot be considered valid unless the claim is at present supported by a sufficient discovery, even though there may have been a proper discovery at the time of a withdrawal or at some other time in the past. The loss of the discovery, either through exhaustion of the minerals, changes in economic conditions, or other circumstances, negates the validity of the claim.

184 IBLA at 216. The Board concluded that: "If a deposit of an uncommon variety mineral cannot be profitably sold ***for the uses for which it allegedly has a special value***, that deposit is not a valuable mineral deposit under the mining laws. *See U.S. v. Forsythe*, 100 IBLA at 241-42." Armstrong, 184 IBLA at 220 (emphasis added). Thus, at the RMR quarry, if the end use does not require the mineral to have the requisite "distinct and special value," it is not considered a locatable mineral. At RMR's quarry, there is no question that using the mined rock for rip-rap and construction aggregate does not require the chemical-grade properties that might have existed years ago when the deposit was considered locatable and the claims valid.

In finding that the end uses of the mined mineral is dispositive of whether the mineral was still locatable, the Board noted with approval the U.S. Court of Appeals for the Tenth Circuit's decision

in Copar Pumice Co. v. Tidwell, 603 F.3d 780 (10th Cir. 2010), which held that a pumice deposit which was no longer being used for a qualifying end use could no longer be considered a locatable mineral. Although Copar Pumice involved a mine on Forest Service land, with a different set of mining regulations, the Board in Armstrong held that the need to determine whether the end use was qualifying, under both BLM and Forest Service regulations, was required under the McClarty test, which BLM regulations incorporate (43 C.F.R. § 3830.12(b)). These decisions are directly applicable to the RMR quarry, as the evidence indisputably shows that RMR now sells rocks from the quarry for mostly, if not entirely, common variety purposes.

In addition, the Board held that a claimant may not "bootstrap" sales for qualifying uses (which the evidence does not show is occurring at the RMR site) onto a mine that primarily produces rock for non-qualifying uses in order to show that the claim is valid:

> It is improper to rely upon revenues from common variety sales to conclude that a potentially locatable material can be mined and marketed at a profit. When there is more than one market for the mineral from a claim, and the sales in one or more of those markets would be considered sales for common variety uses, that fact must be taken into consideration when determining whether there is a discovery of a locatable mineral. The uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals (or products) may not be considered when predicting profitability.

184 IBLA at 225. This is important here, as RMR admits on its webpage that the quarry rocks are sold for a variety of end uses, many, if not all, are non-qualifying end uses. In other words, as held in Armstrong, the fact that a small percentage of produced minerals may qualify as locatable (even if true in this case which certainly has not been shown), such limited revenue cannot be used to support an assertion that the claims contain the requisite deposit of a valuable locatable mineral under the Mining Law.

For the Mid-Continent quarry, BLM has already recognized the need to investigate the end uses in order to determine if the minerals are common variety or locatable. In 2000 and 2004, BLM notified the previous operator that such investigation should include a review of the company's recent sales contracts, and other evidence of end uses. For example, in a May 17, 2000 letter from the Acting Field Manager of BLM's Glenwood Springs Resource Area to previous mine owner Pitkin Iron Corp., BLM stated:

> "[E]ven if mining should be allowed in the future, it would clearly have to be for material of high (locatable) quality and for qualifying end uses. The uses you have outlined could be considered as qualifying under proper circumstances. However, as indicated our requirements would be more thorough documentation and convincing proof of a direct tie, such as contracts, etc., to actual and ongoing qualifying markets along with an extraction plan. Speculation about what markets might be available in the future would not be sufficient. Limestone is not considered to be subject to location in the absence of viable qualifying uses.

May 17, 2000 letter at 1 (attached). During that period, Pitkin Iron was asserting, via sales contracts, that the sale of the quarry minerals for chemical-grade rock dust qualified the mineral as locatable. However, in an October 13, 2004 letter to Pitkin Iron, BLM reiterated that it required proof of such end-use contracts, stating that, so long as

> …it is clearly documented that the material is being used for rock dust and ***not for non qualifying uses, such as road base*** or being stored for speculation, there should not be a common variety issue. The ability to enter the existing rock dust market, however, must be demonstrated, sustained and documented, otherwise, a trespass may occur. This will require copies of the contracts and/or agreements between Pitkin, AMM [purchaser of the minerals] and the qualifying end uses.
>
> We will continue to monitor the success of the operation through communications, field check and appropriate production/sakes reports on a per site basis. BLM may also conduct sampling and analysis to monitor the quality and composition of the limestone being produced from the mining claims.

October 13, 2004 letter from Field Manager, Glenwood Springs Field Office, to Pitkin Iron, at 1 (emphasis added) (attached).[1]

The only way to ascertain if a truly locatable mineral is being currently produced from the Mid-Continent Mine and has been produced from the quarry those 15 years since BLM's clear letter, including in the past two-and-a-half years since RMR purchased the mine, and thus if the current authorization of operations under the 1872 Mining Law is still valid, is to immediately obtain sales contracts and records that will establish the end uses of the sold minerals.

Based on the controlling legal position of the Interior Department detailed in Armstrong, and BLM's previous positions regarding this quarry requiring verification of qualifying end uses, we respectfully request that BLM immediately obtain from RMR all sales contracts, shipping orders, and other relevant information regarding the sale and/or shipment of materials produced from the quarry. Also, and as noted by BLM in 2004, BLM should immediately conduct sampling of the mined materials in order to determine the chemical and physical characteristics of the deposit at this time.

The City of Glenwood Springs is very concerned that BLM has delayed any exercise of your authority on these matters for what appears to be more than a decade. It is a concern that, as long ago as 2012, BLM's Colorado River Valley Field Office conveyed to the mine owners in writing that operations were exceeding the mine's authorized Plan of Operations, that the mine operator

[1] Pitkin Iron later challenged BLM's position that the limestone used for rock dust purposes during that period was not locatable. The federal court in Colorado ruled that BLM failed to provide a sufficient *prima face* case for claim invalidity and remanded the mineral report back to the agency. Pitkin Iron Corp. v. Kempthorne, 554 F.Supp.2d 1208 (D. Colo. 2008). Notably, the court did not rule on the issue of whether the minerals were locatable at the time. In any event, as noted above in Armstrong, the fact that the limestone removed from the mine at that time may have been locatable is irrelevant as to whether it is now, especially given the fact that current uses of the minerals are for non-qualifying end uses.

would need to provide monthly sales operations information to prove the locatability of the minerals being extracted and sold, and that a "comprehensive modification to the Mine Plan of Operations" was to be provided to BLM by January 15, 2013 – but that BLM did not follow through on any of these demands, as far as we can tell from the incomplete FOIA responses that BLM provided in the past year. *See* Letter from Bureau of Land Management, Colorado River Valley Field Office, Associate Field Manager Karl R. Mendonca to Peter Babin of CalX Minerals, LLC (October 19, 2012) (attached). It is a concern that BLM again told RMR President Gregory Dangler in October 2016 that the Mid-Continent Mine operations were not in compliance with the mine's authorization, that RMR would need to show that the mining claim was for locatable minerals, and that BLM would need to provide a new Plan of Operations in a "reasonable amount of time." *See* Conversation Record of BLM Colorado River Valley Field Office Assistant Field Manager Gloria Tibbetts regarding conversation with RMR President Gregory Dangler (October 4, 2016) (attached).

It is even more of a concern that, after more than six years of the Mid-Continent Mine owners apparently ignoring BLM and the agency ignoring Mid-Continent's illegal operations in return, the RMR company can now turn in a proposal to expand the mine's operations by 5,000%, with a new, 447-acre footprint, and BLM would consider such a proposal with no action taken on the years of non-compliance, nor conduct any serious investigation into whether the mine operators have been digging and selling free, publicly-owned minerals for common variety purposes.

Given the significant information showing RMR has clearly extracted common mineral materials from the Mid-Continent mines, BLM must confirm that this is an unauthorized use of public lands in violation of federal law and BLM regulations. BLM may not allow such unauthorized use where it would be detrimental to the public interest, or where the aggregate damages to public lands and resources would exceed the public benefits. Indeed, BLM should proceed now with actions to determine and recover the damages to the United States from these years of trespass.

The City of Glenwood Springs appreciates the opportunity to work with the Colorado State Office, the Valley Field Office, and BLM headquarters on these important matters. The current illegal operations, as well as the proposed expansion of RMR's mine, pose a tremendous risk to the City of Glenwood Springs, its robust tourist economy, and incredible scenic beauty and quality of life. We thank you for your support of our rural Colorado town and its 10,000 residents.

Sincerely,

Jonathan Godes
Mayor
City of Glenwood Springs

cc: Senator Cory Gardner, Representative Scott Tipton, Senator Michael Bennet

Attachments:

- United Sates v. Armstrong, 184 IBLA 180 (2013)
- May 17. 2000 letter from BLM to Pitkin Iron Co.
- October 13, 2004 letter from BLM to Pitkin Iron Co.
- October 19, 2012 from BLM Colorado River Valley Field Office to CalX
- Conversation Record of October 4, 2016 by BLM's Gloria Tibbetts

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Glenwood Springs Resource Area
50629 Highway 6 and 24
P.O. Box 1009
Glenwood Springs, Colorado 81602

~~M1981~~ M41582-121 Mid-Continent CST
& M41977-42c Marble Land

IN REPLY REFER TO:

3600
CO-14000

May 17, 2000

Office of the General Counsel
Pitkin Iron Corporation
P.O. Box 2115
1001 Grand Avenue, Suite 106
Glenwood Springs, Colorado 81602

Dear Mr. Delaney:

As previously indicated in our letter dated January 12, 2000, according to the Regional Solicitor, the Interior Board of Land Appeals Decision, IBLA 94-421 established that the Bureau of Land Management (BLM) has superior right jurisdiction over any material within the Community Pit.

The following addresses your specific issues.

Ownership/abandonment:

As your Calcite mining claims have lapsed in the area, you no longer hold any valid rights to the material in question. Any rights arising from potential subsequently filed claims would now be subordinate to the Community Pit [IBLA 94-421, pg. 379]. The Decision indicates that BLM properly established the community pit on land for which you no longer assert a valid interest. Also, BLM may properly preclude any mining operations within the Community Pit boundaries for so long as the Community Pit designation remains in place [pg. 379].

Locatability:

The decision further asserts that even if mining should be allowed in the future, it would clearly have to be for material of high (locatable) quality and for qualifying end uses. The uses you have outlined could be considered as qualifying under proper circumstances. However, as indicated our requirements would be more thorough documentation and convincing proof of a direct tie, such as, contracts, etc., to actual and ongoing qualifying markets along with an extraction plan. Speculation about what markets might be available in the future would not be sufficient. Limestone is not considered to be subject to location in the absence of viable qualifying uses. Additionally, we do not consider the two large 'fines' (waste rock) piles to consist of locatable grade material.

Bureau Uses:

We have not yet formulated final plans for the disposition of the lower grade fines pile, however, some of the material may be utilized toward ongoing maintenance of the Transfer Trail road. Under the Community Pit

designation we can sell or use any mineral materials included within the designated area for any purpose.

Access:

Any access for removal of the higher (locatable) grade material would be subject to the above requirements. Access for the purpose of final reclamation will be granted, as coordinated through this office.

Reclamation:

Upon consultation with the State of Colorado, Division of Minerals and Geology, you are bound by the reclamation plan approved by the State and through our approval correspondence dated August 18,1982 and July 21, 1989. We have no intention of assuming your responsibility for reclamation on these quarry sites. As the sites have been in an extended period of non-operation since at least 1994 and the fact your continuing uncompleted reclamation responsibilities conflict with our now established Community Pits, as well as other possible multiple uses, I suggest you commence reclamation this field season so that we may bring this matter to a final conclusion.

Sincerely,

Steve Bennett
Acting Field Office Manager

cc: Greg Squire
Colorado DMG
1313 Sherman St., Rm. 215
Denver, CO 80203

grM Comments M-82-121 GD

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Glenwood Springs Field Office
50629 Highway 6 and 24
P.O. Box 1009
Glenwood Springs, Colorado 81602

TAKE PRIDE IN AMERICA

IN REPLY REFER TO:

COC-55903

October 13, 2004

RECEIVED
OCT 18 2004
Division of Minerals & Geology

Diane Delaney
Office of General Council
Pitkin Iron Corporation
P.O. Box 2115
Glenwood Springs, Co 21602

Dear Diane:

The following is in response to your letter dated September 7, 2004 regarding the potential rock dust operation and your agreement with Alternative Mining Methods, LLC (AMM). At this time, so long as any material removed from a claim meets the necessary criteria, such as, MSHA rock dust specifications and it is clearly documented that the material is being utilized for rock dust and not for non qualifying uses, such as road base or being stored for speculation, there should not be a common variety issue. The ability to enter the existing rock dust market, however, must be demonstrated, sustained and documented, otherwise, a trespass may occur. This will require copies of the contracts and/or agreements between Pitkin, AMM and the qualifying end users.

We will continue to monitor the success of the operation through communications, field checks and appropriate production/sales reports on a per site basis. BLM may also conduct sampling and analysis to monitor the quality and composition of the limestone being produced from the mining claims.

For the proposed operation, additional details will need to be provided to address the following: site security (gates), public safety associated with the truck traffic, specific mining plans, timelines, volumes involved, hours of operation, equipment utilized, blending requirements, markets, road maintenance and reclamation requirements. The existing CDMG bonds will be evaluated to ensure that they are adequate for the projected operations.

If you have additional questions regarding this matter, feel free to call Jim Wilkinson @ 970-244-3085 or Steve Bennett @ 970-947-2813.

Steve Bennett

Field Manager

cc: CDMG

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Colorado River Valley Field Office
2300 River Frontage Rd
Silt, Colorado 81652

October 19, 2012

IN REPLY REFER TO:
COC-074205

Peter Babin
CalX Minerals, LLC
c/o 5501 Lakeshore Drive
Littleton, Colorado 80123

Dear Mr. Babin,

This letter is a follow-up to our September 27th meeting, in which the concern was raised that your current mining operations have exceeded the BLM authorized Plan of Operations dated Aug. 18, 1982. As such, it was agreed upon that CalX Minerals would supply a comprehensive modification to the Mine Plan of Operations no later than January 15, 2013. In a separate e-mail, the BLM will provide an example Plan of Operations from a similar mining operation, to assist you in providing the level of specificity that BLM will require for approval. The BLM is also requesting the revised Plans of Operations address road safety concerns; specifically road usage, road maintenance and improvements, and winter snowmobile access. Once my staff has the opportunity to review the submitted plans, based on 43 CFR 3809.411, the BLM will determine whether an environmental review is required under the National Environmental Policy Act.

In addition to providing a modification of the Mine Plan of Operations, CalX Minerals and the BLM agreed to the following action items:

- CalX Minerals shall meet with pertinent road users to discuss the upcoming winter season season use and develop long-term solutions to meet winter recreation needs. Greg Wolfgang, BLM Recreation and Travel Management Specialist, will assist CalX Mineral with scheduling and organizing this meeting.

- CalX Minerals shall consult with Colorado Department of Parks and Wildlife regarding planned winter mine operations prior to submitting a waiver of timing limitation from the BLM.

- CalX will supply the BLM with monthly sales information. The BLM request that sales information be provided no later than 20 days after the end of previous month.

- The BLM will also research some of the basic road jurisdiction questions that were raised at the meeting, and will continue to work with you to keep communication open about the potential for a natural gas line installation in the future.

The BLM looks forward to continued cooperation with CalX Minerals regarding management and administration of mine operations. Please contact Pauline Adams (970) 876-9071 or padams@blm.gov with any questions or concerns.

Sincerely,

Karl R. Mendonca
Associate Field Manager

Cc: Justin Olin, CalX Mine Superintendent

John Skadow, CalX CFO

Conversation Record

Name of person contacted or in contact with you: Gregory M. Dangler Isaac Morgan	Organization: Rocky Mountain Resources
Date: October 4, 2016	Telephone (circle one): incoming or outgoing
Time: 1:00 p.m.	Visit (circle one): yes or no
Name of person documenting this conversation (print): Gloria Tibbetts	Signature: 10/12/2016

Greg and Isaac visited my office to conduct due diligence research related to their company's potential purchase of the CalX business. I explained the difference between locatable and salable minerals and directed them to the sections of the CFR with the applicable regulations. I also explained that the current operation appears to have exceeded the footprint of the most recent authorization and that a new Plan of Operations would be required. They expressed that they are still conducting research to determine exactly which products they want to produce at the site, but that they don't have as much interest in the aggregate material that is currently being developed there. They plan to conduct additional research on refining processes that would allow them to sell to markets other than general mineral materials. They were not completely forthcoming with their plans, but mentioned that they are looking at a process for a concrete additive that takes advantage of the high quality limestone found at the site. They are currently considering acquisition of private land in the area and were unsure whether they would locate any of the refinement facilities at the site or would construct them on private land.

I explained that the BLM would need to review the processes and/or final products to determine if they meet the requirements to be considered locatable. I encouraged them to finalize their research and make a determination about which products they want to pursue, then to contact Jessica Lopez-Pearce to begin the process of making a determination of the applicable regulations. I explained that the determination would be made in consultation with the BLM Colorado State Office and that it would be beneficial to have the determination in place prior to them finalizing and submitting a Plan of Operations.

I explained that there is no set deadline for submittal of a new Plan of Operations, but that the BLM expects them to submit one in a reasonable amount of time since portions of the existing operation appear to be exceeding the current authorizations for the site. I encouraged them to remain in contact with Jessica throughout the design process if they have questions and, once they have a good idea of what they want to do on the site, come in for a pre-application meeting with the BLM specialists to discuss the proposal. The specialists could provide them with feedback on possible survey needs and any suggested mitigation that could help minimize impacts.

I also explained the process that the BLM follows for NEPA compliance, including the potential for contracting and/or cost recovery for the survey and NEPA work. We discussed the scrutiny that this site continues to receive from surrounding land owners and how that may affect the review process. We discussed the potential proprietary information that would be included in the Plan of Operations and the need for the company to mark any such information as confidential. The Plan could be formatted to include all or most of Proprietary information in a separate section or appendix that could be redacted from the publicly available copy rather than requiring redactions all throughout the document. We also discussed how to handle the proprietary information in the NEPA process to ensure both protection of such information as well as compliance with the NEPA public disclosure requirements.

RMR stated that they already met with the state and county regarding compliance needs at the site. We discussed the coordination that typically happens between the state and federal regulatory agencies and I stressed the importance of ensuring compliance with both levels.

Action Required (attach additional sheets if needed): None at this time
Action Taken: None at this time
Signature, Title, and Date (after action taken): Not Applicable

GFS(MIN) 19(2013) (I.B.L.A.), 184 IBLA 180, 2013 WL 6631451

United States Department of the Interior

Office of Hearings and Appeals

Interior Board of Land Appeals

UNITED STATES
v.
KELLY ARMSTRONG, ET AL.

IBLA 2011-98
Decided October 31, 2013

****1 INDEX CODE:**

36 C.F.R. pt. 228, subpt. A

36 C.F.R. pt. 228, subpt. C

36 C.F.R. § 228.41

36 C.F.R. §§ 228.57-.67

43 C.F.R. § 185.121(1960)

43 C.F.R. § 185.121(b) (1963)

43 C.F.R. § 3830.12(b)

***180** Appeal from a decision by Administrative Law Judge James H. Heffernan declaring four mining claims invalid. NNMC-145310 through NNMC-145313.

Affirmed.

1. Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Determination of Validity- Mining Claims: Locatability of Mineral: Generally

In order to establish that a deposit of pumice is an uncommon variety locatable under the guidelines identified in McClarty v. sec'y of the Interior, 408 F.2d 907 (9th Cir. 1969) (codified at 43 C.F.R. § 3830.12(b)): (1) there must be a comparison of the mineral deposit with other deposits of such mineral generally; (2) the mineral deposit at issue must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, then the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price that the material commands in the market place or by reduced cost of production resulting in greater profit.

2. Mining Claims: Determination of Validity-Mining Claims: Discovery: Generally—Mining Claims: Locatability of Mineral: Generally—Mining Claims: Withdrawn Land

Once made, a discovery must be maintained. Even though a claimant may have once made a discovery and ***181** extracted minerals from a claim, the discovery may be lost if the mineral deposit is exhausted or if there is a material change in market conditions rendering it unreasonable to expect that the mineral can be mined at a profit. The loss of the discovery, either through exhaustion of the minerals, changes in economic conditions, or other circumstances, negates the locatability of the mineral.

3. Mining Claims: Determination of Validity-Mining Claims: Discovery: Generally—Mining Claims: Locatability of Mineral: Generally—Mining Claims: Withdrawn Land

This Board employs the "prudent man" standard, of which marketability is a part, to determine when a discovery has been made. Under the prudent man rule, a claim is regarded as valuable if a prudent person would expend additional money working the claim, with a reasonable prospect of success in the effort to develop a paying mine. Evidence of past success in extracting and marketing a mineral from a mining claim is of limited evidentiary value—a mining claim cannot be considered valid unless the claim is at present supported by a discovery.

****2** 4. Mining Claims: Determination of Validity-Mining Claims: Discovery: Generally—Mining Claims: Marketability

A total cost analysis of a potentially paying mine must include capital costs and related operating costs.

5. Mining Claims: Determination of Validity-Mining Claims: Discovery: Generally—Mining Claims: Marketability

Only a showing of a present market for an uncommon variety mineral is relevant in making a marketability determination. If a deposit of an uncommon variety mineral can not be profitably sold for the uses for which it allegedly has a special value, then that deposit is not a valuable mineral deposit under the mining laws.

6. Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Contests-Mining Claims: Determination of Validity-Mining Claims: Discovery:

Generally—Mining Claims: Discovery: Marketability-Mining Claims: Locatability of Mineral: Generally

The marketability of an uncommon variety of mineral must be established without regard to sales of the mineral for common variety uses. It is improper to rely upon revenues from common variety sales to conclude that a potentially locatable material can be mined and marketed at a profit. When there is more than one market for the mineral from a claim, and the sales in one or more of those markets would be considered sales for common variety uses, that fact must be taken into consideration when determining whether there is a discovery of a locatable mineral. The uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals (or products) may not be considered when predicting profitability.

Appearances: Joseph E. Manges, Esq., Santa Fe, New Mexico, for appellants; Steve Hattenbach, Esq., Office of General Counsel, U.S. Department of Agriculture, Albuquerque, New Mexico, for the Bureau of Land Management.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE ROBERTS

Richard Cook, Kelly Armstrong, Debbie Cantrup, and Shirley Cook, d/b/a Copar Pumice Company (herein referred to as Claimants, Contestees, or Copar), appeal from a January 4, 2011, Decision of Administrative Law Judge (ALT) James H. Heffernan, declaring the Brown Placer Mining Claims Nos. 9-12 (NNMC-145310 through NNMC-145313) null and void because the pumice derived from the Claims is a common variety mineral, which is not legally locatable. For the following reasons, we affirm Judge Heffernan's opinion in all respects.

I. *BACKGROUND*

As noted by Judge Heffernan, this matter "has a long historic and procedural background, going back to a hearing [which he] conducted ... in July and August 1998, which implicated the instant four claims." Decision at 1. We will recite the historic and procedural facts only as necessary to place the present contest into perspective.

In the late 1980's, the Claimants located 23 mining claims on Federal lands in sec. 1, T. 18 N., R. 3 E., and sec. 6, T. 18 N., R. 4 E., New Mexico ***183** Principal Meridian, Sandoval County, New Mexico, in what is now the Jemez National Recreational Area, a part of the Santa Fe National Forest, which is managed by the U.S. Department of Agriculture's Forest Service (FS). Copar operates the El Cajete pumice mine on the Brown Claims. Transcript (Tr.) 1321; Government Exhibits (G-) 12-13 (maps).[1]

****3** On September 9, 1989, Claimants submitted a patent application to BLM based on a discovery of pumice that was assertedly suitable for and marketed to the garment processing industry. On January 16, 1991, BLM issued a first half final certificate for the claims. However, BLM had not issued a patent to them before Congress enacted the Jemez National Recreation Area Act (JNRAA), codified at 16 U.S.C. § 460jjj, on October 12, 1993. Along with 57,000 acres of the Santa Fe National Forest, the Brown Claims were within the boundaries of this newly-designated National Recreational Area. The JNRAA withdrew all lands within the recreation area from entry subject only to valid existing rights. The JNRAA expressly prohibited BLM from granting any new patents on public lands located within the National Recreational Area.

Any party claiming to have been deprived of a property right by the JNRAA prohibition could file an action for compensation in the United States Court of Federal Claims within one year after the date of enactment of the Act. *See* 16 U.S.C. § 460jjj-2(v)(a)(2). The Claimants filed a complaint in the U.S. Federal Claims Court, where they argued that the statute effected a taking of their claims. *See Cook v. U.S.*, 37 Fed. Cl. 435, 438 (1997); *Cook* v. *U.S.*, 42 Fed. Cl. 788, 789 (1999). In January 1999, the Claims Court granted the Cook family partial summary judgment on the takings claim for the Brown Claims 9-12 (embracing the El Cajete mine), holding that the patent application "claim[ed] discovery of a locatable mineral" ("valuable and marketable" and "'unique' because of its size, purity, and lack of discoloration or staining qualities"), and that the Government failed to prove that the Cook family had not complied with the "terms and conditions entitling them to patent." *Cook v. U.S.*, 42 Fed. C1. at 793, 795.

Meanwhile, the FS examined the validity of the 23 unpatented mining claims, and determined not to contest the validity of the claims that formed the El Cajete mine. The FS issued a mineral report in 1995 concluding that pieces of pumice in ***184** excess of 3/4 inches in size (+3/4" pumice) from Brown Claims 9-12, used in the garment finishing industry, is locatable under the 1872 Mining Law, subject to administration under the regulations at 36 C.F.R. Part 228, Subpart A.[2]

The parties eventually entered into a Settlement Agreement before the Claims Court on April 4, 2002, resolving the takings issue. The Claimants received $3,911,838.00, which compensated them for their loss of patent rights, as well as for "any right [Copar] may have had to dispose of common variety pumice from Brown Placer Mining Claims 9-12." *Copar Pumice Co., Inc. v. Tidwell (Copar* v. *Tidwell)*, 603 F.3d 780, 789 (10th Cir. 2010). The Claimants agreed to maintain the Brown Claims "as unpatented mining claims subject to all pertinent statutes and regulations." Ex. G-11, ¶ 4. The Claimants acknowledged that Copar is "*prohibited from the disposal of the common variety pumice* produced from Brown Placer Mining Claims Nos. 9-12 pursuant to 16 U.S.C. § 460jjj-2(b)." Ex. G-11, ¶ 4 (emphasis added).

****4** While the Claims Court litigation was ongoing, Copar began developing plans for operating the El Cajete mine. In December 1996, Copar submitted a "Plan of Operations for Mining Activities on National Forest Lands" for FS approval. The plan stated that "[f]or the total life of the project, approximately 10 years, it is anticipated that 1,000,000 tons of +3/4 inch pumice will be mined." Ex. G-22 (Plan of Operations) at 60. "The common variety pumice that will not be removed from the pit" would be used to "contour the pit to a less than 30% slope as mining progresses westward." *Id.* at 73 (quoted at 603 F.3d at 789). On November 20, 1997, the FS approved the plan of operations for a period of 10 years, until November 19, 2007. Copar also submitted an "El Cajete Pumice Mine Monitoring Plan" that detailed, *inter alia*, how FS personnel would ensure that only +3/4" pumice left the El Cajete mine for processing, and would check pumice trucks to inspect haul tickets to verify their origination and haul destination.

Copar filed an extension of operations with the FS in September 2005 and officially submitted its renewed plan of operations on August 27, 2007, to continue operations on the Brown Claims 9-12 for another 10 years. *See* Ex. C-26B, C-7 (Plan of Operations for the El Cajete Pumice Mine), Ex. C-8 (Plan of Operations for the El Cajete II Pumice Mine). The existing El Cajete (El Cajete I) mine would span ***185** approximately 15 acres, and of that area, about 8 acres have been cleared and fenced. Ex. C-7 at unpaginated (unp.) 4, 6; *id.* at App. 5 (2007 Pit Plan Map, Sec. F-2). The other 7 acres comprises undisturbed lands. No onsite, fixed structures were anticipated. A portable screening plant would be set up at the mine along with a generator, portable toilet, equipment storage container, and guard shack. Ex. C-7 at unp. 9. No pumice smaller than 3/4" would be loaded onto trucks. The trucks would transport the pumice to a screening plant in Espanola, New Mexico (the Espanola plant), which is on private lands.

Copar also proposed to mine the El Cajete II, located on Brown Claims 9 and 10, upon depletion of the El Cajete I mine. The second mine would consist of approximately 68 acres, to be mined in multiple 8-acre sections. *See* Ex. C-8 at unp. 4. The entire 68-acre area would have to be cleared of trees, stripped, and an access road cut to the mine site. The equipment and

structures would be moved from the El Cajete I mine site to the El Cajete II staging area. *Id.* at unp. 9.

The FS initiated another mineral examination to "re-evaluat[e] the laundry pumice market and the validity of the claims at the present date of examination." Ex. G-32 at 18.[3] The certified Mineral Examiners, FS geologists Mark E. Schwab, Diane Tafoya, and Michael A. Smith, concluded in their November 2007 Mineral Report that the pumice deposit on the Brown Claims was no longer subject to location under the mining laws. In so finding, the Examiners accepted the proposition that the claims contained pumice that possessed the properties deemed by the laundry business to be uniquely suited to its use and that not just any pumice could serve that industry: "This report does not question ... the physical characteristics of the deposit as documented in the 1995 validity examination. The pumice on the claims is unstained, white, and relatively lithic free, and the large fragment sizes of the pumice make it suitable for use in the stone wash laundry industry." Ex. G-32 at 18.

****5** However, the Examiners determined that a market decline had a direct "bearing on the current locatability of the pumice deposit." Ex. G-32 at 18 (emphasis omitted). The stone wash laundry industry did not demand the laundry grade pumice it once did because of the availability of substitute methods, advancements in technology, fashion trend changes, and the massive outsourcing of the stone wash industry to Mexico and other countries. The Examiners found that the disappearance of the market for laundry grade pumice was accompanied by a steep price reduction in such pumice, with the result that there was no longer a ***186** premium, or significant, price difference between the laundry grade pumice sold by Copar to the garment industry and common variety pumice sold by Copar and other marketers for common variety purposes.[4] With no higher price to reflect the deposit's unique and special value, the Examiners believed that an uncommon variety of pumice no longer existed on the claims and that the pumice was no longer locatable.

To show that Copar's large pumice no longer commanded a higher market price than that for common variety pumice, the Mineral Examiners looked at documentation provided by Copar, which included sales data for various representative months between 2001 and 2004, adding up to approximately 800 sales of laundry grade pumice from the Espanola plant. *See* Ex. G-32 at 26-27; Tr. 484. The Examiners did not include Copar's price for bagged laundry grade pumice, concluding that the prices paid for bagged pumice were inflated due to the cost of bags, labor, and processing, and therefore that the prices did not represent the mineral's "intrinsic value." Ex. G-32 at 26; Tr. 608. Moreover, "all but one of the pumice companies throughout the West that [were] contacted no longer sold into the stone wash [industry or market;] they did not have bagged prices to compare." Tr. 605; *see id.* at 604, 606; Ex. G-32 at 25-26. The Examiners computed that Copar's laundry grade pumice sold in bulk between $16.50 and $19.00 per cubic yard, with most of the sales negotiated at the lower end of that price spectrum. Ex. G-32 at 33. The pumice Copar sold for construction purposes was priced between $9.50 and $15.50. *Id.*

In order to compare Copar's prices for laundry grade pumice sold to the laundry industry to what they deemed common variety pumice, the Mineral Examiners selected six other mining companies that produced and marketed pumice similar to Copar's deposit. These six pumice producers once sold their product to garment manufacturers, but no longer did because the market had disappeared. Thus, even though they sold laundry grade pumice, they sold it for end uses such as "construction aggregate, pumice block, faux stone, [and] landscaping." Tr. 470.[5] The Examiners did not average any prices to compute a set average for ***187** either the common variety or uncommon variety price; they let the ranges speak for themselves *(compare* $16.50 to $19.00 per cubic yard (Copar's laundry grade pumice sale prices) *with* $7.25 to $28.25 per cubic yard (other producers' prices for common variety end use pumice, ranging from low cost waste pumice to the higher priced aggregate mixture)). Tr. 653. Based on this information, the Examiners concluded that Copar's prices per cubic yard for +3/4" pumice sold in bulk to the laundry industry were within the range of prices received for common variety pumice sold into the construction industry, and that such prices did not reflect any distinct and special value of the laundry grade pumice. *See* Ex. G-32 at 28-33, Table 7.

****6** Because the Mineral Examiners decided that the laundry grade pumice on the Brown Claims constituted common variety material, which by law is not locatable, they did not report on whether or not Copar showed a valuable discovery on the claims. The FS recommended to BLM that a mining claim contest be initiated.

On February 8, 2008, BLM, on behalf of the FS, filed with the Hearings Division a contest complaint, docketed as NMMC-119839, alleging that the mineral deposit on the Brown Claims 9-12 is not a valuable mineral deposit under section 3 of the Surface Resources Act of 1955 (SRA), 69 Stat. 367 (codified at 30 U.S.C. § 611 (2006)). The Government further alleged that minerals had not been found within the limits of the Brown Claims in sufficient quantities and/or qualities to constitute a valid discovery of a valuable mineral deposit.

Judge Heffernan issued a scoping order, which defined the issues for adjudication. He pointed out that because of the history of the claims, their validity at the time of withdrawal was not a factual dispute in the instant contest; "only their validity at the time of the hearing remains in dispute." ALJ Order dated July 21, ***188** 2009 at 7. Thus, he held that "during the hearing, relevant evidence will be admitted from both of the parties with respect to the current, updated validity of the four claims as of the time of the hearing." *Id.* at 8. The 10-day hearing was set for June 7, 2010, through June 18, 2010.

On January 19, 2010, the Judge ordered the parties to exchange all witness and exhibit lists by March 15, 2010, and to conclude all discovery by April 15, 2010. The Hearings Division held a telephonic pre-hearing status conference on April 30, 2010, where both parties communicated "unresolved discovery issues." ALJ Order dated Apr. 30, 2010. A follow-up conference was scheduled for May 21, 2010, at which time the ALJ planned to postpone the hearing and enter a discovery order requiring the filing of appropriate motions to compel if "significant prehearing discovery issues remain in dispute at that time." *Id.*

On May 17, 2010, 1 month after the discovery deadline and 2 weeks before the hearing's commencement date, the Government submitted a capital and operating cost analysis report prepared by Scott Stebbins (Stebbins Report), concluding that Copar could not develop a profitable mining operation at the El Cajete mine if it were permitted to resume mining laundry grade pumice. The record does not show that Copar moved to postpone the hearing—an important fact, in light of Copar's post-decision objection to the timing of the Stebbins Report. The hearing went forward as scheduled.

II. JUDGE HEFFERNAN'S DECISION

Judge Heffernan summarized the dispute between the Government and Copar in the following terms:
****7** Generally speaking, it was the contention of the [G]overnment in the 2007 validity report that, because of fashion trend changes, introduction of enzymes and other substitute materials, and the massive relocation of the stone washing industry to Mexico and other countries, that the domestic stone washing pumice industry in the United States had dramatically declined, leaving only a few niche markets in locales, such as, Los Angeles. Tr. 725-26, 845,1959-60; Exs. G-32, 45, 46. The [G]overnment contends that such market declines over the last several years have also led, in turn, to an ensuing and consequential decline in the price of Copar stone wash pumice, such that, because of dramatic price declines, said pumice has been transformed from an uncommon back into a common variety material resulting from a dramatic decline in marketplace demand. Tr. 93; Ex. G-32.

***189** To the contrary, during the hearing, the Contestees maintained that a viable market for Copar stone wash pumice still exists, because of the singular characteristics of said pumice, such as, its size, and, in part, because the admitted exits of other competitors from the stone wash pumice market, has left Copar with a virtual, domestic monopoly market potential, if they are permitted to resume mining under their new proposed mining plans of operation. Tr. 1248-49, 1266-69; Exs. C-1, 3, 4. Relatedly, Copar contends that it has developed a new market for its pumice in the biofilter air pollution industry, which they argue should also qualify their 3/4 inch and larger pumice as an uncommon variety. Tr. 2090-100.

Decision at 3-4. Judge Heffernan stated that the contest "hinges upon the factual dispute between the parties with respect to the contemporary price for Copar's stone wash pumice and the size of the remaining, contemporary market for that stone wash pumice, should Copar be permitted to resume mining at El Cajete and proposed El Cajete II." *Id.* at 4.

[1] To determine whether Copar's pumice was a locatable mineral, Judge Heffernan appropriately applied the test set forth in *McClarty v. Sec'y of the Interior*, 408 F.2d 907, 908 (9th Cir. 1969), and codified at 43 C.F.R. § 3830.12(b), to distinguish between common varieties (unlocatable) and uncommon varieties (locatable) of materials. The *McClarty* standards require the following analysis:
(1) Comparing the mineral deposit in question with other deposits of such minerals generally;

(2) Determining whether the mineral deposit in question has a unique physical property;

(3) Determining whether the unique property gives the deposit a distinct and special value;

(4) Determining whether, if the special value is for uses to which ordinary varieties of the mineral are put, the deposit has some distinct and special value for such use; and,

****8** (5) Determining whether the distinct and special value is reflected by the higher price that the material commands in the market place.

43 C.F.R. § 3830.12(b).

In applying the *McClarty* test, Judge Heffernan was most concerned with whether the distinct and special value of the laundry grade pumice claimed by Copar was reflected in the higher price the pumice commands in the market place. "In my opinion, the pivotal factual issue in dispute between the parties in this case is what ***190** contemporary price for Copar stone wash pumice qualifies as a sufficiently 'higher price."' Decision at 5. He concluded that the Claimants had not met their burden of rebutting the Government's showing that the property making Copar's pumice uniquely suited for the garment industry was no longer supported by a significantly higher market price. *See* Decision at 6. He found that, historically, laundries and their distributors paid from $15.50 to $19.00 per cubic yard of laundry grade pumice, *i.e.*, 3/4" and larger, and that those prices were well within the range of prices former stone wash pumice companies charged construction and landscaping companies for common variety, *i.e.*, $9.00 up to $28.75 per cubic yard. Decision at 7, 13 (citing Exs. G-40, G-32 at 33).

In addition, Judge Heffernan found that El Cajete pumice had no distinct and special value or unique physical property for application in the biofilter/air pollution industry, and therefore that the pumice was not locatable for that purpose. He relied on the testimony of Dr. Marc A. Deshusses,[6] who asserted that pumice is not, in fact, widely used in the biofilter industry, whereas lava rock, a common variety mineral, is used extensively. Tr. 1168-72. For potential use in the biofilter industry, he testified that Copar pumice was no different from pumice mined elsewhere, such as in Mexico. Tr. 1192; Decision at 15. Judge Heffernan determined that Copar's laundry grade pumice offered nothing distinct or unique to the biofilter industry—ordinary varieties of pumice could be used for the same purpose. He noted that Scot Standefer, President of PCC Biofilters (PCC), the only purchaser of laundry grade pumice for biofilter use, referred to PCC as "a niche of a niche of a niche" market. Tr. 1039. Judge Heffernan concluded that this minuscule market did not suffice to pass the marketability test of *U.S. v. Oneida Perlite Corp.*, 57 IBLA 167, 189, 88 I.D. 772, 784 (1981).[a]

Even though Judge Heffernan determined that +3/4" pumice was no longer locatable for use in either the laundry or the biofilter industry, he nevertheless addressed the question of whether Copar had a reasonable prospect of resuming and operating a paying mine. He couched this issue as one of marketability, *i.e.*, whether Copar's laundry grade pumice constituted a valuable deposit under the mining laws. He addressed the issue of whether there remains a garment or biofilter industry demand for +3/4" pumice sufficient to support a profitable mining operation at the El Cajete mine.

****9** Judge Heffernan stated that to show that there is a discovery of a locatable mineral, "[c]ontestees must show that the mineral can be extracted, removed and marketed at a reasonable profit." Decision at 8. He applied the ""prudent man rule," ***191** which requires Copar to prove that "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." Decision at 6 (citing *U.S. v. Waters*, 146 IBLA 172, 185 (1998)).[b] Because the test is an objective one, Judge Heffernan was careful to emphasize that costs associated with the claims "must include the amortization costs of the mining equipment, even where the Contestees, such as in Copar's case, may have access to paid-off mining equipment that would be atypical for the average prudent person." Decision at 8 (internal citations omitted) (citing, *U.S. v. Miller*, 138 IBLA 246, 275 (1997);[c] *U.S. v. Feezor*, 130 IBLA 146, 222 (1994)).[d] He specifically found that the apportioned value of machinery and other capital costs were rightly included in the Government's operation costs analyses. Decision at 16 (citing Exs. C-l, C-10; Ex. G-52 at App. N; Tr. 979-82). He found that "Copar's economic analysis failed to include any capital costs or depreciation for approximately $2.9 million of equipment, and ... also failed to account for historic capital expenditures." Decision at 9 (citing Ex. C-10, App. A; Tr. 1000-02, 1664-66, 1726-27).

Judge Heffernan agreed with the Government's position that the stone washed laundry market was all but nonexistent in the United States and that, even if Copar could resume production at the El Cajete mine, it would be highly unlikely that the company could reclaim any of its former market.[7] Judge Heffernan concluded, based upon the record, that the garment industry could absorb only about 7,000 to 10,000 tons of Copar's pumice annually, assuming Copar could procure some past customers. Judge Heffernan found that the Government had established that even if Copar could sell up to 30,000 tons of pumice a year—a generous assumption—its operating costs would always exceed its qualifying revenues. Based on the

Stebbins Report, he found these volumes simply were too small to sustain Copar's operations. He further agreed with the Government that Copar would have to sell a minimum of 30,000 tons of laundry grade pumice to the garment industry in order to break even, but that Copar had not demonstrated the existence of a potential market for that amount. He was not persuaded that Copar had demonstrated that its operations would be profitable, based upon contracts proffered by Copar to prove a potential, future market for 30,000 tons of its laundry grade pumice, given the indication in Copar's post-hearing brief that only two of the contracts were still in place. *Id.* at 17. Thus, Judge Heffernan found it unlikely that Copar could secure a qualified end-use market for 30,000 tons of laundry grade pumice.

***192** *III. THE TENTH CIRCUITS OPINION IN COPAR V. TIDWELL*

****10** At this juncture, it is important to briefly review the Tenth Circuit's opinion in *Copar v. Tidwell*, which involved Copar's disposition of pumice from the El Cajete mine.[8] *Copar* v. *Tidwell* involved Copar's alleged violation of the Settlement Agreement with the FS, whereby Copar agreed to sell only +3/4" pumice, subject to all pertinent statutes and regulations. In 1998, less than a year after Copar began production at the El Cajete mine, the FS learned that Copar was not exclusively selling its +3/4" pumice to the garment finishing industry, but was selling such pumice to other industries for common variety uses. The FS had learned that Copar ***193** acted as if the +3/4" pumice "could be sold for any purpose."[9] 603 F.3d at 780. The FS requested from Copar some means of verification that the pumice removed from the El Cajete mine was being sold for garment finishing uses. In correspondence with Copar, the FS emphasized that "any pumice removed which does not go to the laundry industry is common variety, and the removal is a violation of the Jemez National Recreation Act and the 36 CFR part 228 regulations." *Id.* at 790.

Copar had lost access to its Guaje Canyon mine, which placed Copar "in a bind" for common variety pumice. *Id.* The FS grew frustrated at Copar's failure to cooperate in providing any documentation showing that the pumice sold from the El Cajete mine was going to the laundry industry. Because Copar failed to provide the FS with a verifiable method of showing that all of the pumice produced from the El Cajete mine since April 4, 2002, the date of the Settlement Agreement, had been used only in the stone wash laundry industry, and that any pumice to be mined would only be sold to the stone wash laundry industry, the FS issued a Notice of Noncompliance (NON) on December 23, 2003. The NON required Copar to produce complete records since April 2002 showing how much pumice was removed each month (total production, not just stone wash laundry industry pumice), and the names and contact information for the purchasers of the pumice. Copar filed an administrative appeal, and the FS affirmed the NON on November 21, 2005, and declined to conduct a discretionary review on December 6, 2005. Copar filed a "Petition for Review and Reversal of Agency Decision" in the U.S. District Court for the District of New Mexico, which the District Court denied, and Copar appealed that ruling to the Tenth Circuit.

The Tenth Circuit provided the following context for its decision:
****11** It is undisputed that Copar has sold a portion of its +3/4" pumice for common variety uses. FS correspondence indicates that Copar's president, Kelly Armstrong, and its Operations Manager, Richard Bell, "stated the pumice was not all going for locatable uses." FS meeting notes indicate that Armstrong admitted Copar was "crushing El Caj[e]te pumice to meet their common variety needs and it makes her sick to crush the valuable pumice." Finally, Richard Bell explained in an affidavit that Copar's Guaje Canyon mine "provided the primary source ... of common variety pumice for alternate markets." Copar's "decision to sell processed materials from El Cajete Mine was largely made necessary" when the FS revoked "Copar's use of Forest Road 57 to access [its] Guaje Mine." Copar became "unable to fulfill its ***194** ongoing obligations to supply its customers," and would not "abandon its established commercial relationships."

603 F.3d at 791 (citations omitted).

The FS argued that under 36 C.F.R. § 228.41(c), (d), and (e), Copar's +3/4" pumice is an uncommon variety of pumice only if it is actually used in the garment finishing industry, *i.e.*, an application that utilizes its distinct and special value. Thus, the FS contended that under its regulations, the *end-use* of the mineral determines whether it is common or uncommon variety. According to the FS, +3/4" pumice not used in an application that utilized its distinct and special value was nothing more than common variety pumice that Copar could not extract from El Cajete. In contrast, Copar argued that its +3/4" pumice is an uncommon variety *simply because it is suitable for use* in the garment finishing industry.

The Tenth Circuit stated:
[D]espite the settlement agreement, and despite repeated admonitions by the FS that +3/4" pumice not destined for the

garment finishing industry was merely common variety pumice, Copar has essentially circumvented the settlement agreement by selling a portion of its +3/4" pumice for common variety uses, and has been largely unresponsive to the FS's repeated requests for a proposed method of verifying the end-use of El Cajete pumice. Now, in the face of final agency action demanding mining and sales records as a means of verifying end-use, Copar assails the FS's Notice of Noncompliance, and the underlying interpretation of FS regulations, as arbitrary and capricious, an abuse of statutory and regulatory authority, and an unconstitutional taking.

****12** 603 F.3d at 793. The Tenth Circuit rejected each of Copar's challenges.

The Tenth Circuit agreed with the FS "that an 'uncommon variety' mineral becomes a common variety mineral when it is no longer used in an application that emphasizes its distinct and special value." *Id.* at 795. The Tenth Circuit reasoned as follows:

To qualify as an uncommon variety mineral under subsection (d) [of 36 C.F.R. § 228.41,] a mineral must be "suitable and used" in an application "for which no other mineral can be substituted due to the unique properties giving the particular mineral a distinct and special value." *Id.* § 228.41(d). The portion of +3/4" pumice that Copar has ***195** sold for common variety use does not meet this definition because it is not being used in an application that emphasizes its distinct and special value. In this situation, this particular +3/4" pumice becomes a common variety mineral—i.e., a deposit with some economic value that is used in a generic application—that Copar acknowledged it has no authority to mine.

Id. The Tenth Circuit expressly upheld the FS' application of the regulation, concluding that if +3/4" pumice is used in common variety applications, then it is common variety pumice.[10] The Tenth Circuit left no doubt that under the Settlement Agreement, in which Copar agreed that it had no right to extract common variety pumice from El Cajete, laundry grade pumice not destined for the garment industry is common variety pumice, which Copar has no right to mine. *Id.* at 802.

IV. ANALYSIS—LOCATABILITY OF EL CAJETE PUMICE

In applying the *McClarty* factors, we begin with the fact that in 1997, the FS approved a 10-year plan of operations for the mining of uncommon variety pumice from the El Cajete mine, and that uncommon variety pumice was defined as +3/4" pumice used in the garment finishing industry. Tr. 123; Ex. G-22. As noted by Judge Heffernan, this case "is somewhat unusual in that the [G] overnment does not contest that the subject four claims were valid as of the withdrawal date under the JNRAA." Decision at 2. Thus, "the issue for adjudication in the June 2010 hearing [was] the validity of the subject claims as of the hearing date." *Id.* The parties to the contest agreed that the central question was whether the +3/4" pumice extracted from the El Cajete mine "has been transformed from an uncommon back ***196** into a common variety material resulting from a dramatic decline in marketplace demand." *Id.* at 3.

****13** [2] Once made, a discovery must be maintained. "A claimant must prove that a Valuable mineral deposit' exists at the time of discovery ... at the time of the withdrawal of the land subject to the claim; and maintain said discovery throughout administrative hearings for contest or patent." *Husman v. U.S., 616* F. Supp. 344, 347 (D. Wyo. 1985), *aff'g U.S. v. Husman*, 81 IBLA 271 (1984).[h] Even though a claimant may have made a discovery on a claim, the claimant runs the risk of losing the discovery if the mineral deposit is exhausted or if there is a material change in market conditions rendering it unreasonable to expect that the mineral can be mined at a profit. The loss of the discovery, either through exhaustion of the minerals, changes in economic conditions, or other circumstances, negates the locatability of the mineral. *E.g.*, *Mulkern v. Hammitt*, 326 F.2d 896, 898 (9th Cir. 1964); *U.S. v. Multiple Use, Inc.*, 120 IBLA at 81.

Under either *McClarty* or *Copar v. Tidwell*, it is the end use of the pumice that is determinative of whether the mineral is uncommon and thus locatable. The +3/4" pumice is uncommon only if it is actually used in an application that utilizes its distinct and special value. Take away the garment finishing (or the biofilter) market for Copar's +3/4" pumice and it is nothing more than common variety pumice. Similarly, if the pumice is used for construction or other uses that do not require the unique property of +3/4" pumice, because of any size will do, it cannot be said to be uncommon variety pumice. Were it true that the end use of the mineral is irrelevant and not subject to regulation, as Copar argued in *Copar* v. *Tidwell*, there would be no point in calling the pumice uncommon variety other than to claim a discovery of an otherwise unbeatable mineral—an approach soundly rejected by the Tenth Circuit in *Copar v. Tidwell*. As discussed below, we conclude that Judge Heffernan properly concluded that there was no valuable discovery of locatable minerals on the Brown Mining Claims, "the

pumice derived from [the El Cajete] claims being a common variety mineral, which is no longer legally locatable." Decision at 18.

A. Copar's Lack of Reliable Sales History

Any discussion of whether there is a market for Copar's +3/4" pumice in the garment industry, based upon Copar's sales history, is limited by Copar's unwillingness or inability to provide data with regard to end-users of the product. The evidence offered on Copar's behalf is akin to what was offered in *U.S. v. Thompson*, 168 IBLA 64, 108 (2006):[i] It "cannot be verified, and is, in the final analysis, self-serving." Moreover, Copar admitted that "the pumice was not all going for locatable uses," which led the FS to stress that "[c]onfirming the final use of the ***197** pumice is of utmost importance," and to remind Copar that it "ha[d] not cooperated in providing any documentation showing the pumice is going for the laundry industry." 603 F.3d at 799. Copar argued that the FS' insistence that El Cajete pumice be tracked to its ultimate end use is "impracticable and oppressive given the nature of the garment finishing industry." *Id.* at 800. The Tenth Circuit rejected this argument, stating that production of the names and contact information for the purchasers of the pumice, as required by the NON, "avoids the impracticalities and difficulties that Copar alleges. And demonstrating the price that Copar received for its pumice also avoids these alleged concerns." *Id.*

****14** The Tenth Circuit deemed it reasonable for the FS to "expect[] Copar to demonstrate that it disposed of the pumice into a qualifying market, and a showing by Copar that it sold its pumice to wholesalers at a price that reflects the mineral's distinct and special value would be a step toward compliance." *Id.* The Tenth Circuit stated:

Sold as a stonewashing agent, Copar's +3/4" pumice commands a price significantly higher than the price it would fetch if sold for common variety application: the 1995 mineral report indicated that "[b]ulk shipments for garment finishing pumice sell for $20-54 per cubic yard (f.o.b.) as compared to the range of $5.50-12.00 per cubic yard (f.o.b.) for common variety pumice, ... and Copar emphasized a similar price disparity at oral argument. Given the economic realities of the pumice market, we expect that the price Copar received for its +3/4" pumice would be a significant, if not dispositive, step towards verifying disposition into a qualifying market. Therefore, the degree of end-use verification the FS ultimately seeks will likely not require Copar's distributors to disclose the identities of their customers.

Id.

This suggestion by the Tenth Circuit that the higher price received by Copar for its +3/4" pumice would be a step toward verifying end-use was based on the assumption that laundry grade pumice commanded a significantly higher price than common variety pumice. However, this assumption must fail in the face of Judge Heffernan's finding that Copar's laundry grade pumice did not command a premium price. If no premium price was received for laundry grade pumice, then Copar loses its primary means of calculating the volume of pumice sold into the laundry market. If Copar cannot, or will not, identify the ultimate purchasers of laundry grade pumice, and there is no other way to identify the pumice as laundry grade, then Copar is simply left without any means of demonstrating compliance with the ***198** Settlement Agreement or FS' regulations. Just as importantly for our analysis, there is no way to evaluate Copar's sales in terms of the *McClarty* standards.

The Tenth Circuit made clear that any approach that failed to enable the FS to verify that the end-use of the pumice was in the laundry finishing industry violated the Settlement Agreement and the FS regulations. Our attempt to define the market for +3/4" pumice should Copar resume operations at the El Cajete mine is complicated by the very uncertainties regarding the end-use of the +3/4" pumice of concern to the Tenth Circuit. The record makes abundantly clear, as Judge Heffernan found, that since 2002, Copar's "predominant income stream ... was ... not from the sale of qualifying stone wash pumice for the denim industry, but, rather ... from the sale of pumice for common variety uses." Decision at 14. With these realities in mind, we will attempt to define, as of the date of the hearing, the market for +3/4" pumice for use in the garment industry, or, as a secondary matter, for use in the biofilter industry.[11]

B. Lack of Market for Uncommon Variety Pumice

****15** What we can surmise about the demand of the garment and biofilter markets for laundry grade pumice comes primarily from the report prepared for the FS by Peter W. Harben and David G. Lobdell (Harben & Lobdell) entitled *Laundry-Grade Pumice Market Evaluation with Special Emphasis on Product from Northern New Mexico, USA(August 2006) (Ex. G-45), and updated in Laundry-Grade pumice Review of Available Market Information Regarding Product from Northern New*

Mexico, USA (April 2010) (Ex. G-46). In their studies, Harben & Lobdell leave no question that the market for +3/4" pumice for use in the laundry industry has essentially disappeared. They state that "[t]he US denim apparel industry has contracted to the point where none of the top ten selling brands of jeans in the United States have domestic production facilities," and that "[t]he Wal-Mart effect has helped to virtually eliminate stonewashing from the United States and transfer the activity to Mexico and farther afield." Ex. G-46 at 6.

Harben & Lobdell analyzed Copar's sales of pumice from 2005 through 2009. Those sales were primarily to Bobby Garcia, owner of Bobby Garcia Trucking, Inc., of Fairview, New Mexico, who sold bulk pumice to Pumice Works, Inc., located in El Paso, Texas. Harben & Lobdell found such sales "difficult to categorize since the material was sold in bulk, and largely in the size range between ***199** 3/4" to 1"+." *Id.* at 26. They stated that "[b]ecause of the volumes involved and the unusual product mix, it is suspected that a significant quantity of the material was going to unidentified markets other than stonewashing." *Id.* The assumption that the laundry grade pumice was being sold into common variety markets "was underscored following Copar's closure by the decrease in sales to Bobby Garcia without a corresponding rise in Mexican imports." *Id.* Like the Tenth Circuit, Harben & Lobdell encountered problems in identifying "[d]efinitive Copar stone wash sales" and "[s]ales of Copar material to Bobby Garcia and allotted to stonewashing." *Id.* at 27. They concluded that "most of the material sold to Bobby Garcia is probably not going into stonewash markets." *Id.* at 27 (emphasis added).

Using production and sales data prepared by Larry Gore, who assisted in preparing a Production Verification Report dated January 7, 2010, Harben & Lobdell determined that Copar sold about 16,718 tons (31,475 cubic yards) of laundry grade pumice in 2006 and an estimated 11,633 tons (22,144 cubic yards) in 2007. Ex. G-46 at 26, Table 7. However, the authors then stripped those volumes by approximately half, deducting Copar's sales of volumes purchased by Garcia in bulk: Other than to conclude that any given shipment to Garcia went exclusively to Pumice Works, they did not have "any definitive data that says where that went." Tr. 736.

****16** According to Harben & Lobdell, the figure showing importation of pumice from Mexico provided in the *U.S. Geological Survey Minerals Yearbook* (USGS Minerals Yearbook) would best represent domestic laundry grade pumice consumption after 2007 because no other United States pumice producer sold product to Los Angeles at that time. Ex. G-46 at 24; Tr. 745. The difference between imports from Mexico in 2007 and 2008 was an approximate increase of only 377 tons. *See* Ex. G-46 at 24 ("Official US trade statistics show that imports of pumice from Mexico were 1,209 tonnes in 2007, 1,552 tonnes in 2008, and 1,239 tonnes in January [through] November 2009. This may be regarded as the approximate annual consumption rate of pumice in laundries in the western United States."), 26, Table 7, Line 4. This was considerably smaller than Garcia's sale of 7,333 tons of pumice to Pumice Works. *See* Ex. G-46 at 26, Table 7, Line 5. Based on this analysis, Harben & Lobdell estimated that only about 7,000 to 10,000 tons per year of Copar's laundry grade pumice could be marketed to the stone wash industry in the future. Tr. 752-53.

Harben & Lobdell concluded that in 2010, "Copar is capable of accessing markets for 5,000 to 7,500 tons of laundry grade pumice for export (mainly [to] Mexico) plus 2,000 to 2,500 tons for domestic consumption, for a total of 7,000 to 10,000 tons per year." Harben & Lobdell, Ex. G-46, at 9. The Government states that "[t]his is *a very liberal estimate*, which takes a good sales year (2006), and assumes Copar could re-enter the market with the same market share, despite the continued ***200** market decline." Government's Answer to SOR at 9 (emphasis added). This liberal estimate included much of Garcia's pumice purchases in the estimated market size, even though, as stated by Harben & Lobdell, several factors indicated that not all of the pumice hauled by Garcia to Pumice Works could have gone into the stone wash industry.

Copar claims that all of the pumice sold to Garcia went to the garment industry, but offers no evidence to refute the Harben & Lobdell report except Garcia's uncorroborated testimony. Copar claims that Garcia paid a premium price for the pumice he bought when he could have purchased cheaper pumice. However, his claim that no one would buy pumice at the putative "laundry grade prices" and later use it for common variety purposes, such as manufacturing faux stone, is contradicted in the record. The fact is that much of Garcia's stone was purchased at prices significantly below the $19.00 high seen at the end of 2007. Tr. 619, 1530. Moreover, there is no way to estimate how much +3/4" pumice was even shipped to Pumice Works, given that Garcia is reported to have screened pumice for shipment to Pumice Works to +1". Harben & Lobdell, Ex. G-46 at 14. Pumice Works had a market for both large and small pumice (faux stone and bagged laundry pumice), and the equipment for screening the pumice was onsite.

****17** Based upon Copar's own records, the Government concluded that since 2002, Copar sold only about 48,930 cubic yards of pumice into the laundry and biofilter industries (41,640 laundry and 7,290 biofilter) while it sold some 579,749 cubic

yards of pumice for common variety uses. *See* Exs. G-28D and 28E1. Copar's contention that its so-called laundry grade pumice sold at a higher price than pumice that must have been common variety tells us little about market size. Given Copar's own record admission that not all of its pumice was sold into a qualifying market, we have no way of knowing whether the pumice claimed by Copar to be common variety was in fact common variety, or in actuality +3/4" pumice sold into the common variety market. Copar has always had the evidence that would definitively answer this question, but has failed or refused to produce it. We therefore properly infer that such evidence would be adverse to Copar's claims. *See Chainman Oil & Gas, LLC*, 182 IBLA 355, 360 n.4 (2012),[j] and cases cited.[12]

***201** On May 24, 2013, Copar filed a Motion to Supplement the Administrative Record (Motion to Supplement) with the deposition testimony of Gore in *U.S. v. Copar*, Civ. No. 1:09-CV-01201-JAP-KBLM, on the basis that the FS "now admits that all of Copar's sales to B. Garcia were, in fact, made to the stonewash laundry industry." Motion to Supplement at 2. Copar does little to place the excerpt from the deposition into context, although we can surmise from a question from counsel for Copar that this *U.S. v. Copar* matter relates to an action for damages by the FS against Copar for the sale of common variety pumice. Copar asserts that the excerpt provided "directly undermines and contradicts the basis of the ALJ's finding below regarding the relatively minuscule size of the laundry market." *Id.* at 3. We disagree with Copar's characterization of Gore's testimony.

In determining whether a sale of pumice was destined for the laundry industry, Gore stated that he relied on the invoices or the materials that Copar provided to him, "[w]ith the exception of Bobby Garcia, who provided his records, and Pumice Works, who provided their records." Ex. A. to Motion to Supplement at 57. He stated that he "looked at Pumice Works to see where they were selling to" and found "[t]hat they were selling to laundries. And if he [Garcia] was supplying them, then that made it a laundry sale." *Id.* at 58.

Copar contends that Judge Heffernan's "statement on page 14 that Copar sold 579, 749[3] [cubic yards] for common uses is erroneous because it improperly included all of B. Garcia sales." Motion to Supplement at 4. Copar states that "[b]ased upon this erroneous evidence, the ALJ reached the ... unsupportable conclusion [that] 'Copar's predominant income stream since 2002 was, therefore, not from the sale of qualifying stone wash pumice for the denim industry, but, rather, was from the sale of pumice for common variety uses, providing that its earlier markets for qualifying stone wash pumice had declined dramatically since the 1998 Copar hearing.'" *Id.* (quoting ALJ Decision at 14).

****18** Copar's argument is fallacious, if not misleading, on several bases. Gore's testimony before Judge Heffernan concerned Copar sales of pumice during the period April 2002 through 2008. Tr. 163, 179. Keeping in mind that Copar's plan ***202** of operations for the El Cajete mine expired in 2007, and that the sale of El Cajete pumice, uncommon or otherwise, would have been contrary to the Settlement Agreement signed in 2002 in the absence of such a plan, we turn to the hint of the time frame at issue in the deposition testimony submitted by Copar. On page 56 of the deposition there is a reference to the "early sales" under consideration—that started in "April of '06." Ex. A to Motion to Supplement at 56. Copar places undue emphasis on an exchange that, for the most part, does not involve the period examined by Gore in the Production Verification Report, and about which he testified at the hearing before Judge Heffernan.

During the hearing, Gore discussed his role in compiling the Production Verification Report, which contained multiple workbooks (Excel spreadsheets) to tabulate the production and sales data provided by Copar. He stated that after the 2007 mineral examination, the FS received approximately 80% of Copar's production and sales data from its El Cajete mine for the dates April 2002 through the beginning of 2008. Tr. 163, 179. Each month's data was entered into a separate workbook and contained the invoice number for the particular sale, size of the pumice sold, cubic yards of pumice sold, unit price per cubic yard, total sale price for that particular invoice, and to whom the product was sold. *See* Tr. 166, 170-71, 173-176, 211-17. Gore broke these sales into three groups: "Laundry Use," "Uncertain Use," and "Non-laundry Use."

Gore explained in the Production Verification Report and during the hearing that he looked to the purchasers to determine the pumice's end use. *See* Production Verification Report at 26; Tr. 164-65, 296. If the company was known to be in the stone wash industry, or the company name indicated it was a laundry, or a cursory internet search indicated it was in the stone wash industry, then the company and its purchases were placed in the "Laundry Use" category. If a cursory web search indicated the purchaser was not in the stone wash laundry industry, then that company's purchases were placed in the "Non-laundry Use." Production Verification Report at 26. When it was not possible to determine, based on the information known or provided, whether the purchaser utilized Copar's pumice for stone wash purposes, Gore relegated those companies and their associated purchases to the "Uncertain Use" column. *Id.* He did not consider the sales price or the volume of those sales

when deciding whether the purchaser was related to the laundry industry. Tr. 327.

****19** Gore only included bagged sales when considering total laundry sales. Thus, any sale he labeled "bulk," "super sack," or "bagged - not laundry," were not counted in his final calculations. Gore's documentation shows that Garcia was the largest purchaser of Copar's laundry-grade bulk pumice. *See* Production Verification Report; Tr. 320; G-28A (Production and Sales Data Tabulation Report). Garcia bought ***203** 63,037 bulk tons between 2002 and 2008 and the average price paid was around $19.00 per cubic yard. However, Gore did not count Garcia's purchases towards laundry use because the pumice was bought in bulk, and the laundries purchased pumice in bags, rather than bulk. Tr. 325-27.

Based on his reading of Copar's sales records, Gore testified that Copar's sales of its pumice for non-laundry and uncertain uses far exceeded its sales of pumice for stonewashing denim, which showed that pumice on Copar's claims were primarily valuable for common variety uses. That showing proved that the company's earlier stone wash markets had declined so dramatically that Copar could not sustain its business on the laundry market alone. Tr. 142.

The data compiled by Gore also shows that PPC bought approximately 3,388 tons (5,647 cubic yards) of large (greater than 0.75 inches) pumice over a 6-year period. The pumice was bagged in super sacks weighing one ton each (1.9 cubic yards). PPC bought 112 super sacks in 2002 for $100.00 per sack ($52.63 per cubic yard). In 2004, the biofilter company purchased 916 super sacks for $100.00 each. The next transaction between Copar and PPC did not occur until 2007, when it paid $80.00 per sack for 1,866.00 super sacks ($42.11 per cubic yard). PPC bought 494 super sacks from Copar's stockpiled laundry-grade pumice in 2008 for $80.00 per bag.

In sum, the deposition testimony excerpt submitted by Copar in its Motion to Supplement does not demonstrate error in Judge Heffernan's decision. That excerpt concerns a limited period addressed in Gore's Production Verification Report, and it does not indicate whether the pumice was sold in bulk or in bags. Moreover, the excerpt does not indicate the range of prices received for the pumice—an important issue, given that the Tenth Circuit stated in *Copar* v. *Tidwell* that a showing that Copar "sold its pumice to wholesalers at a price that reflects the mineral's distinct and special value would be a step toward compliance" with the requirement that it "sell into a qualifying market." 603 F.3d at 799. We see no validity in Copar's argument.

C. No "Higher Price" for Laundry Grade Pumice

The Government notes that "[a]lthough the full McClarty Test was originally briefed, the issue of premium price was the most contentious." Answer at 12. Judge Heffernan stated that "the pivotal issue in dispute ... is what contemporary price for Copar stone wash pumice qualifies as a sufficiently ""'higher price."DDD' Decision at 5. He reviewed the evidence presented and concluded that the prices Copar received for laundry grade pumice did not show the "premium price" required under *Multiple Use*, 120 IBLA at 102-04:

> ****20 *204** The Copar revenues fall within the range of prices demonstrated by the [G]overnment to be applicable in 2010 to common variety pumice sales. Ex. G-40. Even more important, this expressed revenue is less than twice the revenue calculated for an average of Copar's own common variety sales, that is, $13.00 per cubic yard, which was Copar's last year of operations on El Cajete. Ex. G-60. This is an insufficient price differential to meet the *Multiple Use* premium price test for the conversion of otherwise common grade material into uncommon grade material.

Decision at 5. He noted that in meeting its obligation to show that its pumice was of an uncommon variety, Multiple Use "'presented evidence that its pumice was fit for use as a garment washing abrasive, commanding a price well above that paid for common variety pumice."' *Id.* (quoting *Multiple Use*, 120 IBLA at 103).

Judge Heffernan concluded that Copar had "proved that, in some instances, their selling prices for their 3/4 inch plus laundry-grade pumice is somewhat higher than that for common variety pumice," but that Copar had "not proven that their selling prices 'far exceed' average prices for common grade pumice being sold by western producers." *Id.* at 7. He stated that "the 'higher price' regulatory test is properly read, in consonance with *Multiple Use*, to require a substantially higher, a

significantly higher, price than that recovered for common variety material." *Id.* He noted that in 1989, at the time of Copar's former patent application, +3/4" pumice was selling for five times the price of common construction grade pumice. He further noted that some 8 of 17 other common variety pumice products from Western pumice producers sell for the same or higher prices than Copar's laundry grade pumice. *See* Exs. G-40, G-41, Tr. 475-99. He noted that Tafoya testified that the $19.00 price range for Copar's laundry grade pumice "would not distinguish the Copar stonewash pumice ... from its common grade." Tr. 622. In relation to Exhibit G-41, Tafoya stated that it showed "there's not a marked difference in price for the three-quarter-inch-plus versus the three-quarter-inch-minus materials." Tr. 498.[13]

***205** Judge Heffernan provided the following summary of the evidence with regard to prices:

> As of 2006, of some 22 common variety pumice products investigated by the [G] overnment, seven were priced higher than Copar's lowest price for stone wash pumice, which was $15.50; two common variety products were priced the same as Copar's highest stone wash price of $19.00; and seven common variety products were priced higher than Copar's most expensive stone wash pumice sale at $19.00. Ex. G-40; Tr. 475-99. Comparing pumice deposits across the western United States, the [G]overnment determined that the Copar stone wash prices ($15.50-$19.00) fell within the general range of prices for common variety pumice sold by western pumice producers ($9.00-$28.75). Ex. G-32, Table 7, Ex. G-4; Tr. 459-61, 475-99. From 2003 to 2007, common variety bulk pumice sales averaged from $9.00 to $13.00, while bulk sales of laundry grade pumice averaged $16.00 to $19.00. Ex. G-60; Tr. 1825-26. This is not a sufficient price premium to qualify under the *Multiple Use* test.

****21** Decision at 12. He compared "Copar's own common variety sales for construction grade pumice from the El Cajete and South Pit mines," which ranged from $10.00 per cubic yard to $15.50 per cubic yard, with Copar's bulk sales of laundry grade pumice, which ranged from $15.50 per cubic yard up to $19.00 per cubic yard. *Id.* at 13. He agreed with the Mineral Examiners that, "in comparison with other western pumice deposit[s], there was no sufficient premium price associated with the El Cajete laundry grade pumice." *Id.*[14]

***206** The price comparison most favorable to Copar is based upon Copar's own records, which even the Tenth Circuit found unreliable in determining whether the pumice sold was common or uncommon variety. Even then, when comparing common variety sales from the El Cajete and South Pit Mines, the El Cajete pumice sold for stone wash use does not always command a higher price in the market than its common variety sales. *See* Ex. G-60. Copar's common variety sales from those mines sold between $10.00/cubic yard to $15.50/cubic yard for construction, while prices for its "laundry grade" bulk pumice (material that is greater than 3/4") start at $15.50/cubic yard-the same price as its larger common variety construction pumice, and only goes up to $19.00 per cubic yard. *See* Ex. G-32 at 33, Table 7; Ex. G-40; Tr. 459-61.[15]

Reading the record favorably to Copar, common variety bulk sales of pumice from 2003 to 2007 ranged from $9.00 to $13.00 on average, while bulk sales of laundry grade pumice ranged from $16.00 to $19.00, what the Government calls "perhaps a 1.5 times or 50% increase over common variety averages." Answer at 14. The Government states that "the lowest ratio of common to premium price ever approved" was in *U.S. v. Forsythe*, 100 IBLA 185, 241-42 (1987),[n] in which the limestone found to be uncommon variety brought 2.2 times the value of common variety limestone ($7.50 for uncommon variety; $3.38 to $4.41 for common variety). Answer at 13. The Government argues that "[t]he most favorable comparison in this case does not even meet the minimal standard used to once determine this pumice locatable for stonewash use," and that "[t]his fails to meet even the minimal standard proposed by Contestees from *Forsythe* of 2.2 times the price." *Id.* at 15; *see* Tr. 1824-25; Ex. G-60; *Forsythe*, 100 IBLA at 247. We agree with the Government that even if Judge Heffernan erred in stating that Copar would have to show 3 to 5 times the price of common variety pumice to establish a price premium, that error was of no consequence, given his findings that the stone wash market had vanished, that Copar was unable to compete with Mexican pumice producers, and that the price ***207** Copar received for its laundry grade pumice was within the range of the average price of common variety pumice.

****22** Copar alleges that the Government "cherry-picked limited instances where a very small quantity of Copar's common grade pumice was sold at a higher price, and then used that higher price as representative of all common variety pumice." SOR at 23. The record does not support Copar's allegation, though it would be convenient for Copar and the dissent to ignore

the unfavorable evidence regarding the market and prices for the sale of Copar's pumice, uncommon or otherwise. We strongly disagree with Judge Jackson's characterization of the Government's findings as "misleading," because, as we discuss below, it is Copar itself who has adopted a false profile of the market for +3/4" pumice.

The Government provided weighted averages in Exhibit 60, as requested by Copar, and conducted extensive and detailed research into Copar's prices and the prices of other Western producers for a range of 22 different products, including Copar's pumice from other mines. *See* Exs. G-32, 40, 60; Tr. 467-76. Tafoya testified that every effort was made to include all other comparable western deposits. Tr. 467-76, 652-53. Moreover, the Government correctly asserts that Copar has "produced no evidence of another deposit or pumice product that was not already included in the Government's analysis." Answer at 16.

William Jennings, an expert in mining engineering and mineral appraising and valuation, testified on Copar's behalf with regard to prices received for pumice. He worked for Behre Dolbear and Co., a minerals industry consultant, which Copar commissioned to compare the deposit with other pumice deposits, study the markets for Copar pumice, and to examine other materials provided by Copar, including accounting records. In *Study of Copar Pumice's Pumice Mining and Sales Operations in New Mexico* (January 2010) (Dolbear Report), Jennings listed Copar's average laundry grade pumice sales per cubic yard in bulk, which ran from $15.50 (0.75" to 1.125") to $16.75 (1.5" to 2.25") in 2004 to $19.50 (0.75" to 1.125") and $20.00 (1.5" to 2.25") in 2008. Ex. C-14, Dolbear Report, at 12, Table 5.0; Tr. 1231, 1251-52. These prices were primarily based on bulk FOB laundry grade pumice sales to Garcia. Ex. C-14 at 13. To show that these sale prices demanded a premium price in the marketplace, Jennings compared those prices to the average per-ton prices, as recorded by the USGS, for years 2004 through 2008, according to mineral use. Ex. C-14 at 8. He stated that most pumice goes to building blocks or to concrete mixtures and those prices are therefore "the reasonable proxy for the price of common pumice." Tr. 1241. He used the building block price for 2008, $11.67 per ton, or approximately $6.00 per cubic yard, to represent the common variety average industry price of pumice. He then took that price, $6.00, and compared it to Copar's 2008 price of $20 per cubic yard in bulk to Garcia, to show that Copar's ***208** laundry grade pumice price was three times higher than common variety pumice. Tr. 1243-44, 1271.

****23** To show that the mineral is profitable, Jennings compiled all sales of +3/4" bulk and bagged pumice, without regard to end use, tallied it up, and concluded that Copar was able to sell approximately 30,000 cubic yards (15,789 tons) per year. Ex. C-14, Dolbear Report at 14-19, Table 5.6; Tr. 1254-55, 1258-61, 1278, 1280. He concluded that "the market is at least as big as what Copar sells." Tr. 1285. Jennings also looked to recent supply contracts Copar executed with several buyers. Based on past sales and future contracts, he further concluded a healthy market for Copar's laundry grade pumice existed. Jennings did not complete any analysis of whether the sales actually resulted in a net profit. Tr. 1280. Nor did Jennings deduct the cost of bagging and palletizing from Copar's sales value. *Id.* at 1281. According to Jennings, a person of ordinary prudence would be justified in expending further time and resources because the mineral could be extracted and sold for a profit. Tr. 1272.

It is obvious that Jennings selected the most favorable prices for comparison. *See* Tr. 1238-71. He noted that "[m]ost pumice production was as aggregate for concrete and for the manufacture of lightweight concrete building block (USGS Minerals Yearbook)." Ex. C-14 at 8. When making price comparisons in testimony, he selected the lower "building block" price and ignored the higher aggregate numbers shown in his Table 4.2. *Id.*; Tr. 1238-71. In his testimony, he did not refer to the substantially higher industry average for all common variety pumice sales, which would include common variety pumice uses, for each of the years at the bottom of Table 4.2. These averages ranged from $18.27 to $26.17 for the years involved in this contest. A reliable average for common variety pumice should reflect the higher priced common variety pumice so as to not, as stated by the Government, "arbitrarily exclude [] them to artificially reduce the average." Answer at 17.

The Government notes several other deficiencies in Jennings' analysis. *See* Answer at 17. Jennings did not discuss or apply the *McClarty* test in his report and appeared unfamiliar with its requirements. *See* Tr. 1285. He limited his comparison of prices Copar received for laundry grade pumice to USGS averages, and did not conduct any independent investigation of prices. Ex. C-14, Table 4.2; Tr. 1238-71. He performed no analysis of the market after 2007, other than to review Copar's Exhibit 1. Tr. 1286-87. He mistakenly believed that the historic profitability of Copar sales was based solely on locatable sales, when it was based, in great part, upon sales of common variety pumice. Tr. 1290-91. He could not verify whether sales listed in his report were to laundries or not. Tr. 1279-80. He did not deduct any bagging costs from prices received for bagged pumice. Tr. 1281.

****24 *209** Judge Jackson, in his dissenting opinion, dismisses all this evidence. He reviews five recent Copar contracts, each with a different purchaser and entered into after its mining operations were suspended in 2007. His analysis is faulty on

several levels.

Counsel for Copar acknowledged that three of the contracts, negotiated in 2008, may no longer be in force. Judge Heffernan found it telling that Copar stated in its Reply Brief that it "has two contracts currently in place." Decision at 17 (quoting Copar's Reply Brief at 6). Those two contracts were with F. J. Broadman (Broadman) and Garcia. Judge Heffernan stated that "[t]his serves to diminish the putative, future income stream attributable to Copar through the auspices of actual contracts, were mining to resume on the subject claims." *Id.* Copar's contract with Broadman was for 5,000 cubic yards of laundry pumice at $25.00 per cubic yard. However, the contract does not specify a time period over which the pumice is to be purchased or delivered. The contract with Garcia was characterized as an annual contract "for the delivery of 20,000 yards of bulk laundry pumice at $25/yd and 155,000 bags at $1.50 per bag." SOR at 7. The record is clear, however, that Garcia has never bought anywhere near that much pumice from Copar or paid that high a price. *See, e.g.*, Ex. G-46 at 14. Moreover, as we have discussed at length, the record is also clear that not all of Garcia's sales of pumice were to a qualifying market. *See, e.g., id.* at 26. Judge Heffernan noted reservations about both these contracts due to the absence of "penalty provisions for failure to buy specified amounts." Decision at 17.

Judge Jackson's reliance upon the other three contracts, with Holdings International (Holdings), PCC, and Pumice Works—though Copar's lawyer acknowledged they were no longer in force—is misplaced for other reasons. Judge Heffernan noted that "[a]t the hearing, Copar proffered five putative contracts, which they contended, at the time, serve to prove a potential, future market for Copar's stone wash pumice, if mining is resumed on the claims." Decision at 16-17. The ALJ properly evaluated the contracts in terms of the evidentiary value for which they were introduced by Copar. Judge Jackson suggests that we are unfairly requiring Copar to present contracts that are in full force and effect. Our point is that if Copar intends to rely upon putative contracts to establish a present market for laundry grade pumice, the existence and validity of those contracts is fairly an issue.

In examining the contacts, we find, as did Judge Heffernan, that Holdings is a company that the Government states "may not even exist anymore." Government's Post-Hearing Brief at 42. The Government states that Harben & Lobdell "were unable to successfully contact Holdings for the 2010 report." Tr. 1979. The contract with PPC, for the purchase of 2,400 super sacks of pumice, is called into question by Standefer's testimony that PPC "might be able to use up to only 3,700 cubic ***210** yards per year, that is, only 1,875 tons per year." Decision at 17 (citing Tr. 1094). These three contracts specified that Copar would provide "block pumice," *i.e., "+2* size fragments, but Copar's counsel suggested that this provision was based upon a mistake of fact, a mistake later confirmed by Claimant Armstrong. Tr. 1009; 1450-53.[16] Even assuming the remaining contracts are viable, Copar's operating costs would still far exceed revenue. Tr. 979-81. Judge Heffernan thus did not err in concluding that circumstances only "serve[] to diminish the putative future income stream attributable to ... actual contracts." Decision at 17.

****25** The record does not support Copar's statement that there was a "plummet in the price of common variety material since the date of the Government's mineral examination in 2006, 'due to the worldwide recession.'" Answer at 18 (quoting SOR at 19). The Government points out that Copar's own expert stated that the price for many common variety pumice products substantially increased since the start of the recession. As we have seen, Copar's expert relied upon the lower prices for common variety pumice, and stated:

> It is also worth noting that these average prices varied substantially from year to year, in no apparent pattern. Of the averages for the five categories reported by USGS, two went down and three went up, when 2008 is compared to 2007; and three went down and two went up, when 2007 is compared to 2006.

Ex. C-14 at 8.

Contrary to Copar's argument, the 2006 mineral examination involved review of a variety of USGS data on pumice use, production, and average prices. Ex. G-32 at 24-25, Figure 7 and App. G. Similar data was set forth in the 2010 Harben & Lobdell Report. Ex. G-46 at 29. Copar cites to Harben & Lobdell for the statement ***211** that the USGS reported that the "price of construction pumice had fallen from $21.65 per ton in 2006 to only $11.67 per ton in 2008 or to about **$5.83 per yard.** SOR at 20. We do not find these numbers in the record.

What the 2010 Harben Report actually says is that "[t]he average value, dollars per ton, fob for pumice and pumicite in the United States in 2008 and 2009 was around $20 having dropped from recent high of $31 in 2005." Ex. G-46 at 29. The Report explains that, according to the Pumice Specialist at USGS, the price of more than $30 per ton in 2005 was the result of increases in the unit values of the two main end uses of pumice, building blocks and pumice as a soil additive for horticulture and landscaping. The more recent drop was the result of the rapid decline in the construction industry. The Report was careful to explain that "the price of pumice varied greatly by use (reflecting the quality) compared with the average price for all uses and therefore this should be taken as an indication of the overall trend rather than a specific price." *Id.* at 29-30. We agree with the Government that whether the recession is the major reason for the drop in prices is debatable. It may have been a contributing factor.

We agree with the Government that any average must take into account all relevant factors, and not be based upon a "blind reliance on USGS voluntary reporting." Answer at 18. In fact, *Multiple Use* addresses this issue:

> The premise advanced by the dissent fails if the base statistical data is incomplete. To the extent that any producer or consumer is not canvassed, or if canvassed, refuses or fails to respond, any analysis based upon the resulting statistical aggregates will be skewed. Thus the Bureau of Mines report of tonnage produced can be used only if it is shown that the report is sufficiently accurate to be used for that purpose.

****26** 120 IBLA at 130. To this end, the Government and Judge Heffernan relied upon data from 7 companies, including data from Copar itself, as well as prices for 22 common variety pumice products, in arriving at averages to be used in comparing prices of common and uncommon variety pumice.

Copar argues that it "received an even greater premium price for the pumice sold in bags, even after subtracting all bagging costs." SOR at 24. Again, the record does not show this to be the case. The Government's purpose for comparing one deposit of pumice to another is to determine the intrinsic values of the deposits, not values added by transportation or processing. *See* Tr. 469; Decision at 14. Processing costs for bagged pumice are considerably greater than the processing cost for bulk pumice; bagging costs are a value-added element that increases the cost to ***212** produce the pumice by providing additional services, *i.e.*, washing, sorting, bagging, palletizing, and shrink wrapping. *See* Tr. 199. Such costs must be subtracted from the sales price to arrive at the base price for the material sold. Therefore, as the Government correctly points out, "on its face, Contestees' Ex. 3 which compares bagged versus bulk prices with no subtraction of bagging costs is an invalid comparison and not competent evidence of a price premium." Answer at 19.

In its effort to rebut the conclusions of the Mineral Examiners and industry experts, Copar claimed it could purchase bags for less and would make a premium on future sales. The Government provides the following critique of the methodology Copar used to support that assertion:

> However, Contestees' Ex. 45 representing the price of bags was from 2006, and does not reflect current bagging costs. There is no corroborating document for Ms. Armstrong's claim that she could currently purchase bags for as little as $0.18 (Tr. Pp. 1883-1884). Contestees' calculated projected revenue based on prices far above that historically paid ($1.04 for a 25 lb bag and $1.35 for a 35 lb bag) (See Tr. pp. 1874-1877). This price far exceeds the vast majority of its prior sales of 25 lb bags which were for only $0.80. This calculation depends on projected sales with an increased price but apparently subtracts historic costs from 2006 - 2007 (compare Tr. Pp. 762-764, 1431-1433, and 1874-1877 for similarity of price quotes for labor and palletizing). This is not a valid methodology, (subtracting historic costs from projected increased prices) ....

Answer at 20.

In this regard, the Mineral Examiners were careful to state that, although Copar's price per cubic yard for bagged pumice was significantly higher than bulk, when the costs of bagging, palletizing, and shrink-wrapping the loads are deducted, Copar's prices for bagged pumice are close to or less per cubic yard than its prices for bulk pumice. In fact, they concluded that Copar may be making less profit on the bagged pumice than on the bulk pumice, due to the costs of bagging. Tr. 289-92.

****27** Harben & Lobdell corroborated the Mineral Examiners' testimony, concluding that Copar was making less profit on bagged sales than bulk sales. *See* Ex. G-46 at 31; Tr. 764-65. Their findings do not support Copar's claim that bagged pumice received a higher price under *McClarty*. *See* Ex. G-46 at 9-10, 31. They determined that Copar sold its 35-pound bags for an average of $1.35 per bag. *See* Ex. G-46 at 31. "[B]ased on recent practical experience," the authors reported that 27 35-pound bags mak[e] up one cubic yard, that each bag cost $0.37, labor cost ***213** $0.19, and pallets cost [$]0.09 per palletized load. Thus, Copar was earning no more than $18.90 per cubic yard for the 35-pound bags. *Id.* For the 25-pound bags, Copar most likely spent $0.305 on the bag itself, $0.18 per bag in labor, and $0.07 per pallet. Thirty-six 25-pound bags equals one cubic yard. If Copar sold its 25-pound bags at $1.03 per bag, it would receive a $17.08 per cubic yard profit. *See id.*

Judge Heffernan reviewed the evidence with regard to price averages for bagged versus unbagged pumice and reached the following conclusion:

> When bagging costs, estimated by Mr. Lobdell, are subtracted from the selling price, Copar's historic sales of twenty-five pound bagged pumice derived $8.80 to $17.08 per cubic yard, compared to their laundry grade bulk pumice at $19.00 per yard, and their 35 pound bagged pumice at $16.25 to $20.30 per yard. Therefore, Copar was making less money on bagged pumice than on bulk. Tr. 765. Some 86% of Copar's bagged sales to large laundries, such as VF Corporation, during the mid 2000's, sold for an average of $0.80 per bag. Tr. 1924. If one subtracts only the bagging costs, and no other potential preparatory costs, Copar was making approximately $0.15 per bag, which would not cover all of their other operating costs, resulting in Mr. Lobdell's conclusion that Copar was actually losing money on these bagged sales; they were apparently selling below cost. Tr. 289-92, 764-66.

Decision at 14-15. The Government rightly notes that "[u]ltimately, it was this comparison, based on the most favorable numbers produced by Contestees, that Judge Heffernan ruled as inadequate to establish a price premium under McClarty on page 6 of his decision," and that "[e]ven under their own claims of profits, Contestees could not even establish a multiple of two times the common variety price." Answer at 21.

D. Use of Copar Pumice in the Biofilter Industry

Copar claims that its laundry grade pumice is uncommon variety because it is uniquely suited for use in the biofilter industry.[17] Deshusses, on behalf of the Government, testified that the vast majority of companies use a mixture of compost and a bulking agent such as wood chips, because they are cheap and locally available, whereas pumice is not widely used in the biofilter industry. Lava rock, a common variety mineral, is used extensively. Tr. 1168-72, 1180, 1197.

****28 *214** Deshusses was of the opinion that Copar pumice was not different from pumice mined elsewhere, such as in British Columbia or Mexico. Tr. 1192. He stated:

> My personal opinion is that I do not think that pumice is the silver bullet to biofiltration, and I base my answer on a couple of things. First, I don't see it being used by other companies than PCC .... The other reason I want to give ... is that when there is someone who needs air pollution control, they put out a request for bids, and different companies would bid on the projects. And as stated, to my knowledge, PPC is the only company who is using pumice actively.

Tr. 1183-84.

Standefer, President of the biofilter division of PPC, testified that PPC's typical biofilter box is usually 8, 9, or 10' tall, 30' wide, 100' long, and is completely filled with Copar pumice pieces of 1.5" to 3". Tr. 1082. In estimating the market need for Copar pumice, he stated that a single project requires at least 24,000 cubic feet of large pumice (889 cubic yards); however, he later corrected this number, indicating a biofilter system may require only 5,000 cubic feet (185 cubic yards) of pumice. *See id.*; Tr. 1092. PPC has built eight or nine biofilters using Copar pumice, and at the time of the hearing, it had two inquiries and had secured three or four projects "that could easily be in the 20,000 to 25,000 cubic foot range." *Id.* Standefer predicts that demand for PPC's product will increase as air pollution laws become more stringent, *id.* at 1094-95, and stated that PCC's "preferred option" is to use the pumice located on the claims at issue for their future projects. *Id.* at 1094. He described PPC as a "niche of a niche of a niche" of a market. Tr. 1039.

The data compiled by Gore shows that PPC bought approximately 3,388 tons (5,647 cubic yards) of large +3/4" pumice over a 6-year period. The pumice was bagged in super sacks weighing one ton each (1.9 cubic yards). PPC bought 112 super sacks in 2002 for $100.00 per sack ($52.63 per cubic yard). In 2004, the biofilter company purchased 916 super sacks for $100.00 each. The next transaction between Copar and PPC did not occur until 2007, when it paid $80.00 per sack for 1,866 super sacks ($42.11 per cubic yard). PPC bought 494 super sacks from Copar's stockpiled laundry grade pumice in 2008 for $80.00 per bag.

Lobdell, in testimony, estimated the maximum potential sales to PPC to be between 5,000 to 7,000 cubic yards per year, which is equivalent to 2,500 to 3,750 tons per year. Tr. 777-79. In their report, Harben & Lobdell concluded that PPC could purchase approximately 5,000 to 7,500 cubic yards (erroneously reported as tons in the report) per year, but that this amount was contingent on natural gas prices and the willingness of regulatory agencies to favor biofilter use. Ex. G-46 at 9, ***215** 28, 30. Judge Heffernan stated that "[t] his is a far cry from the 30,000 tons per year that Mr. Stebbins cited as the break-even sales point for Copar pumice." Decision at 16 (citing Ex. G-46; Tr. 777-79). Even assuming *arguendo* that pumice offered for sale to PPC is locatable, the evidence does not show enough of a market, when combined with the limited garment industry demand, to support a profitable mining operation.

****29** Judge Heffernan observed that PPC is the only current customer in the United States who uses pumice in biofilter applications, and that "such a minuscule potential customer market does not suffice to pass the applicable marketability test, with respect to whether Contestees have proven that it will be economically valuable to reopen mining at El Ca[j]ete I and II." Decision at 15. His review of the record showed the following:

> PPC Biofilters purchased only 240 cubic yards of Copar pumice in 2002; they purchased none in 2003; they purchased 1,790 cubic yards in 2004; they purchased none in 2005; they purchased none in 2006; they purchased 3,360 cubic yards in 2007; and they purchased 1,600 cubic yards in 2008 from Copar's stockpile reserves, which remained after the mine closure in 2007. Ex. G-28D; Tr. 557-58. Such episodic, relatively small purchases do not pass the *Oneida Perlite* marketability test.

Id. We agree with the Government that "[a]lthough PPC Biofilters may have a personal preference for El Cajete pumice, that does not mean there is a special and distinct value for El Cajete pumice under the McClarty Test." Answer at 23.

E. The "Prudent Man" Test—Loss of a Discovery of Locatable Pumice

We now turn to the question of whether the market for laundry grade pumice, as limited as the record shows it to be, is sufficient to support a profitable mining operation. Two primary factors, i.e., an inadequate market and a reduced price for the +3/4" pumice, point to the unavoidable conclusion that Copar cannot operate the El Cajete mine at a profit. For the following reasons, we conclude that Judge Heffernan properly ruled that, at the time of the 2010 hearing, the Brown Claims 9-12 were no longer valid, since the pumice derived from the claims is a common variety mineral which is no longer locatable.

[3] Once a mineral listed in the Common Varieties Act is found to be an uncommon variety, and therefore locatable under the mining laws, the validity of the claim containing that mineral depends on the discovery of a valuable mineral deposit. 30 U.S.C. §§ 22, 29, 37 (2006). Since the mining laws do not define a "valuable deposit," this Board employs the "prudent man" standard, of which marketability is a ***216** part, to determine when a discovery has been made. Under the prudent man rule, a claim is regarded as valuable if a reasonably prudent person *would* expend additional money working the claim, with a reasonable prospect of success in the effort to develop a paying mine. *See U.S. v. Rannells*, 175 IBLA 363, 375 (2008)[o] Thus, evidence of past success in extracting and marketing a mineral from a mining claim is of limited evidentiary value—a mining claim cannot be considered valid unless the claim is at present supported by a sufficient discovery, even though there may have been a proper discovery at the time of a withdrawal or at some other time in the past. The loss of the discovery, either through exhaustion of the minerals, changes in economic conditions, or other circumstances, negates the validity of the claim.

****30** "Assumptions regarding a prudent person are based on objective standards related to the nature of the mineral deposit disclosed on the claim, and not on the attributes or circumstances of the claimant." *U.S. v. Pass Minerals, Inc.*, 168 IBLA 115, 121 (2006).[p] "[T]his Board has held repeatedly that the test of whether there has been a discovery of a valuable mineral deposit on any claim is an objective test, not a subjective one, and that the financial abilities of the claimants are irrelevant to this inquiry." *U.S. v. Oneida Perlite Corp.*, 57 IBLA at 189, 88 I.D. at 780. Thus, when evaluating whether minerals on the claim have a reasonable prospect of being sold into an existing market at a profit, we look to what a prudent miner would do on the claim being evaluated as well as the potential market for the extracted mineral.

1. Costs of Extracting, Processing, and Marketing the Pumice

[4] When considering the potential profits of a mineral, any analysis must include both the expenses and revenue associated with mining the claim. Expenses are the costs necessary to establish and maintain a mining operation. In *U.S. v. Coleman*, 390 U.S. 599, 602 (1968), the U.S. Supreme Court stated that a person of ordinary prudence will not extract minerals when "there is no demand for them at a higher price than the costs of extraction and transportation." The cost of extraction includes the direct cost of mining, which includes, but is not limited to, labor, heavy equipment operation and maintenance, screening, sorting, crushing, permitting, and reclamation. Capital costs are also a part of mineral extraction. *See, e.g., U.S. v. Newman*, 178 IBLA 174, 191 (2009);[q] *U.S. v. Wigglesworth*, 178 IBLA 51, 59 (2009).[r] Capital costs typically include start-up expenses related to pre-production activities like development work (surface stripping, access road construction, etc.), working capital, and equipment needed for extraction, processing, and transportation. *See U.S. v. Martinek*, 166 IBLA 347, 368 (2005);[s] *U.S. v. Ubehebe Lead Mines Co.*, 49 IBLA 1, 10 (1980).[t]

However, even though a prudent person may own his or her own equipment at the time the mineral is valued, there is a cost associated with the ***217** use of that equipment in conducting the operation that must be assigned and charged against revenue. In *U.S. v. Feezor*, 130 IBLA 146, 222 (I994)[u] (appeal dismissed per stipulation, sub nom. *Nat'l Credit Union Admin. Bd. v. Babbitt*, No. l:00-cv-6772-AW/DLB, E.D. Calif. Mar. 15, 2002), the Board held that from an economic standpoint, the cost of equipment will be the same regardless of whether the miner possesses machinery at the time the Government examines the claim or will purchase it in the future—the required equipment is valued by its use, not necessarily its purchase price. The Board reasoned that a person who owns equipment outright before the project begins generates an opportunity cost for that equipment:

****31** [T]he cost estimates clearly excluded outlays for equipment which contestees intended to utilize. In explaining the failure to provide outlays for various items of mobile equipment, Edmiston noted that contestees had informed him that they "had a surplus of equipment from another job, project or plant or operation that had gone out of commission ... [a]nd that it was his intent that we utilize the equipment." ... Accordingly, no costs were allocated for these items which, according to [the claimant], included "a 580 backhoe, a three-cubic-yard loader, three-ton forklift, 10-ton truck, two pickups, some water tanks and welders and miscellaneous tools." *Id.* This approach, however, proceeds on a fundamentally flawed basis.

To suggest that, because an individual happens to already have on hand various equipment which will be used in mining, such equipment is essentially ""free" is no different than arguing that, because an individual happens to have large amounts of cash which are not being invested, use of the cash in an enterprise is also without cost. Regardless of whether or not either the equipment or the cash is being presently put to beneficial use, both are possessed of a present opportunity value which might be expressed with respect to equipment as its rental value and with respect to cash as its interest value. Utilization of either presently unused equipment or presently uninvested capital represents consumption of the opportunity value attributable to both, and this lost opportunity value is properly assessed against any income in determining the net

profitability of an enterprise. The failure of the [[[[[economic report] to factor in these costs in its analysis necessarily resulted in an overstatement of any possible return.

U.S. v. Feezor, 130 IBLA at 222. Thus, whether the miner pays an opportunity cost or purchase costs, the value ends up being the same. This valuation method embodies ***218** the objective prudent man standard—what is required to extract, process, and market the mineral on a particular claim is the same no matter who mines it.

The major shortcoming in Copar's analyses, identified and explained by Judge Heffernan, was the failure to include the amortization costs of the mining equipment, even though Copar "may have access to paid-off mining equipment that would be atypical for the average prudent person." *Id.* at 8 (citing *U.S. v. Feezor*, 130 IBLA at 222; *U.S. v. Heard*, 18 IBLA 43 (1974);[v] *U.S. v. Horn*, 16 IBLA 211 (1974)).[w] Although Copar's equipment and machinery may be paid off, its use cannot be said to be free, as Copar alleges. Judge Heffernan stated that "[t]his requirement for a full accounting of costs is a major reason why none of the various scenarios run by Mr. Stebbins reflect profitability for Copar, and, as he testified, it is important to include as a cost the apportioned value of machinery that is attributable to the claims." Decision at 9 (citing Tr. 943, 1023-25). He continued: "Copar did not do this. Copar's economic analysis failed to include any capital costs or depreciation for approximately $2.9 million of equipment, and Contestees also failed to account for historic capital expenditures." Decision at 9 (citing Ex. C-10, App. A; Tr. 1000-02, 1664-66, 1726-27).

****32** In his dissenting opinion, Judge Jackson adopts Copar's position that because the company already owns the equipment, those costs need not be taken into account in determining the profitability of the proposed mining operation at the El Cajete mine. This was the flawed analysis that Judge Heffernan rightly rejected as contrary to law. *See* Decision at 9. The Board stated in *U.S. v. Miller*, 138 IBLA 246, 275 (1997),[x] that "[i]t was because of the fact that we recognized that the prudent man test was an objective standard that we have rejected attempts by claimants to assert that they would have no equipment costs because they intended to use equipment which they already owned." (Citing *U.S. v. Feezor*, 130 IBLA at 222). The Government is correct that in applying the prudent man test, mining costs necessarily must include the amortization cost of the equipment used in the mining operations, even though the claimant has access to machinery at a cost less then the average prudent person would have to pay. Answer at 30 (citing *U.S. v. Heard*, 18 IBLA at 48; *U.S. v. Horn*, 16 IBLA at 214; *U.S. v. White*, *72* I.D. 522, 526 (1965)).

Copar argues that Stebbins' analysis is flawed because he analyzed a hypothetical operation that involved equipment purchases when Copar already owns the necessary equipment. *See* SOR at 27-29. We agree with Judge Heffernan that Copar misstates the applicable legal standard, which is whether a "prudent man" could make a profit, not whether Copar with its unique advantages of cheap labor and used equipment could make a profit. Copar is incorrect to complain that Stebbins included mine development costs for the El Cajete II mine, such as permitting, new fencing, and clearing of land. *See* SOR at 26-27. The costs of ***219** undertaking these actions must necessarily be accounted for in the analysis—the new plan of operations describes those actions. Whatever validity this argument may have would apply only to the small remnant of the El Cajete I mine that has already been cleared, and not to the costs necessary to continue development of the El Cajete I mine and the full proposed development of 50 additional acres for El Cajete II. *See* SOR at 3-4. While Copar might re-enter and mine the lingering remnant of the El Cajete I mine without incurring these costs, the proposal to develop and mine El Cajete II, from which Copar will extract the vast majority of future pumice to be sold, will certainly entail such costs. We fail to see how Stebbins erred in taking those costs into account; in fact, as Judge Heffernan properly found, application of the prudent man rule requires that such costs be considered.

The requirement to fully account for all costs explains why none of the various scenarios considered by Stebbins showed a profit. Stebbins testified that the apportioned value of machinery that is attributable to the site is properly charged against revenue. Tr. 943, 1023-25. He testified that anything that has been used and done on the property and cannot be transferred, is a sunk cost, while things that have value and can be applied to a different property or sold are an investment of the operator. Tr. 902-03. He asserted that this is the standard approach to economic valuations in operations such as that proposed by Copar. Tr. 902-04. Accordingly, the portable equipment owned by Copar is not a sunk cost. In fact, it is located, for the most part, miles away on a separate facility (the Copar facility in Espanola). Thus, as Stebbins testified, machinery such as the Phoenix Jig has value as a whole or as its components. Tr. 1808-09. Such is the case with all the other machinery Contestees excluded from their economic analysis. If included, such capital costs show a historical net operating loss on locatable sales, *i.e.*, only sales of +3/4" pumice that is not sold for common variety uses. In arguing that Copar would realize a huge loss on locatable sales, the Government properly adds a reasonable cost for the equipment, and makes the following

calculations:

> ****33** If Contestees' Ex. 43 were taken at face value, Contestees' claimed total net profit for 4 years [is] ... only $693,829.25 (this is the combined net profit shown on Contestees Ex. 43 - CPC-003443, (corrected) for fiscal years 2004-2007). Any reasonable depreciation for $2.9 million of equipment (say 10% a year or $290,000) would result in a net loss for every year based on Contestees ['] Ex. 43. A straight cost analysis also indicates a net operating loss. During fiscal years 2004 to 2006 Contestees' Ex. 43 claims a net profit of only $472,357.69 (See Contestees['] Ex. 43 - CPC-003443, (corrected)). By comparison, Copar expended $632,865.00 on equipment that was excluded from Contestees ['] Ex. 43 for those three fiscal years - again indicating a cumulative net loss if those costs were included.

***220** Answer at 31 (footnote omitted). The Government is correct that Copar's Exhibit 43 does not show a profitable operation when the excluded equipment costs are included. Moreover, any scenario based on that flawed documentation (such as Exhibits 11, 11 (corrected), 41, 41 (corrected), 43, 43 (corrected), 40, 40 (corrected)) purporting to show a profit is likewise flawed.

2. Marketability of the Pumice

To show that the mineral deposit is marketable, the minerals on the claim must have a reasonable prospect of being sold into an existing market at a profit. *See U.S. v. Knoblock*, 131 IBLA 48, 80, 1011.D. 123, 140 (1994).[y] A present market encompasses what reasonably could be sold at the time of valuation; actual sales data is not required. *See U.S. v. Foresyth*, 100 IBLA 185, 239 (1987).[z] "Evidence of market potential is customarily given through the testimony of a person having specific or general knowledge of the existing market." *U.S. v. Foley*, 142 IBLA 176, 185 (1998)[aa] (citing *U.S. v. Whittaker*, 95 IBLA 271, 286 (1987)).[bb] "That person may have knowledge of market conditions as a seller or as a buyer of that product or as an independent observer." *Id.* (citing *U.S. v. Shiny Rock Mining Corp.*, 112 IBLA 326, 352-53 (1990)).[cc] A discovery of a valuable mineral exists when there is a reasonable prospect that the commercial value of the deposit exceeds the cost of extracting, processing, transporting, and marketing it.

[5] Only a showing of the Market for uncommon variety pumice, i.e., pumice to be sold into and used by the garment (or biofilter) industry, is relevant in making a marketability determination for the El Cajete mine. If a deposit of an uncommon variety mineral cannot be profitably sold for the uses for which it allegedly has a special value, that deposit is not a valuable mineral deposit under the mining laws. *See U.S. v. Forsythe*, 100 IBLA at 241-42.

****34** Our detailed review of the record with regard to the marketability of laundry grade pumice confirms Judge Heffernan's conclusion that "[e]ven Copar's own most optimistic projections, do not anticipate a market approaching 30,000 tons per year, were mining to be resumed," that "Stebbins' estimate of 30,000 tons per year of production for Copar to break even is reasonable and well-founded," and that "[t]here is simply not an adequate qualifying market remaining today for Copar to reach that level of break even performance." Decision at 11. In their updated 2010 report, Harben & Lobdell provided an extensive review of the domestic stone wash denim market, stating that "from the data and information available, it is concluded that Copar is capable of accessing markets for 5,000 to 7,500 tons of laundry grade pumice for export (mainly Mexico) plus 2,000 to 2,500 tons for domestic consumption, for a total of 7,000 to 10,000 tons per year." Ex. G-46; *see also* Tr. 728, 751-55, 1951. Judge Heffernan found this to be a "far cry" ***221** from the 30,000 tons per year that Stebbins showed Copar would need to sell "just to reach a break even point." Decision at 11. We have seen that the stone wash laundry industry has moved to Mexico and Central and South America, "resulting in the virtual elimination of a viable stone wash laundry market for pumice in the United States." *Id.; see also* Tr. 750-51, 1918; Exs. G-32, 45, and 46. Further, pumice has been significantly replaced by substitutes, such as enzymes, diatomaceous earth, perlite, and other synthetics. Exs. G-32, 45, 46; Tr. 725-26, 1956-60. Judge Heffernan noted the following testimony by Harben:

> We think that the potential market here in the United States has declined to about 2,000 tons a year .... None of the two leading world producers, Wrangler or VF, have any manufacturing facilities here in the United States. They've all closed down since that time. So the logic there for thinking that Copar's

> potential market in the domestic market would be about 2,000 tons ... is about what's being imported from Mexico at this time. *When Copar closed in 2007, we could not find any U.S. pumice producer that stepped into their shoes and supplied product.*

Tr. 1926 (emphasis added). Judge Heffernan concluded that, "even if Copar were allowed to resume production at El Ca[j]ete I and II, it is highly unlikely that they could restore any of their former domestic markets, those markets having migrated out of the country." Decision at 12.

Lobdell testified that laundries in Mexico were using Copar and Mexican pumice interchangeably. Tr. 842, 845. Even though Copar pumice may be regarded as being of higher quality than Mexican pumice, the lower market price for Mexican pumice may in fact give it a competitive edge in the contemporary international stone wash market. Tr. 1969-70. Pumice produced in Mexico supplies the demand in Mexico, so that future Copar sales would have to compete with cheaper Mexican pumice, which has come to serve the niche market that remains in Los Angeles, since Copar ceased production in 2007. Tr. 1929-30. Lobdell could not find any mine in the United States still producing and selling into the stone wash industry in 2010. Tr. 736, 744. Within a 10-year period, the number of denim mills operating in the United States had dropped from 635 to 3 or 4. Ex. G-46; Tr. 750-51. Judge Heffernan made the following findings regarding Copar's future market prospects:

> ****35** Were the El Ca[j]ete I and II operations to be brought back into production, given the passage of time since the shut down in 2007, it would be difficult, if not impossible, for Copar to restore its former market share, because virtually all of that production has been supplanted by cheaper Mexican pumice. Tr. 745, 755, 788-89. It ***222** would also be very difficult for Copar to reenter the market and to compete with Mexican producers because of transportation costs and low price competition from those Mexican pumice producers. Tr. 1971.

Decision at 12-13.[18]

The decline in the market was accompanied by an extreme drop in price for laundry grade pumice. Schwab testified that even Arizona Tufflite, which was the subject of the *Multiple Use* decision, quit selling into the stone wash market in 1999 because of the extreme drop in price and sales volume. Tr. 241. Judge Heffernan found that because of the market decline, "[t]here no longer remains any significant distinction between Copar laundry-grade pumice and prices charged for common grade pumice by other western producers." Decision at 13 (citing Ex. G-32 at 33, Table 7). Judge Heffernan's findings with regard to Copar's market history raises some issues which have been of concern throughout our analysis:

> Tellingly, since 2002, Copar has sold only 48,930 cubic yards of 3/4 inch plus El Cajete pumice into the stone wash laundry and biofilter markets. Receipts for Copar's sales of pumice from the El Cajete mine reflect that since 2002, Copar has sold some 579,749 cubic yards of El Cajete pumice for common uses, including construction, block, and landscape uses. Exs. G-28D & G-28E. *Copar's predominant income stream since 2002 was, therefore, not from the sale of qualifying stone wash pumice for the denim industry, but, rather, was from the sale of pumice for common variety uses*, proving that its earlier markets for qualifying stone wash pumice had declined dramatically since the 1998 Copar hearing.

***223** Decision at 14 (emphasis added). These findings involve the very concern at the heart of *Copar v. Tidwell, i.e.*, that Copar was marketing laundry grade pumice for common variety uses, contrary to FS regulations and the Settlement Agreement.

Judge Heffernan's unfavorable findings with regard to the "marketability" of Copar's laundry grade pumice have profound

implications for any discussion of whether that "mineral can be extracted, removed, and marketed at a reasonable profit." Decision at 8 (citing *U.S. v. Coleman*, 390 U.S. 599, 602 (1968); *Cameron v. U.S.*, 252 U.S. 450, 459 (1920)). He stated that Stebbins' analyses were "entitled to considerable deference, because his analyses comport with the applicable prudent man legal standard; whereas, the analyses by Copar do not." Decision at 9.

****36** Judge Heffernan's summary of Stebbins' testimony, which demonstrates that Copar could not operate the El Cajete mine at a profit under any scenario posited—even scenarios that are, in our view, unduly favorable to Copar—is set forth below:

> As Mr. Stebbins testified, he was not evaluating Copar; rather he was evaluating the claims. Tr. 900-903. And, in every analysis which he ran, the four claims were determined to result in a net loss, and none of the mining scenarios set out in his report demonstrate a reasonable potential for returning a true profit. Ex. G-2; Tr. 928, 962-63. Relatedly, Mr. Stebbins created a break even analysis to determine a necessary market size for the most favorable of the mining scenarios over a 10 year period. This break even analysis was calculated at demonstrated sales prices, including sales of 3/4 inch pumice, and determined that Copar would require a market volume of 30,000 tons per year of stone wash pumice in order to break even at the end of ten more years of operation. Ex. G-52; Tr. 963. Contestees were not able to prove a credible potential market of some 30,000 tons per year for their stone wash pumice. In addition, Mr. Stebbins analyzed Copar's proffered future contracts. Ex. C-l. He also analyzed Copar's proposed business plan. Ex. C-10. His analyses proved that Copar's real operating costs would always exceed their potential revenues, under their two proposed new plans of operation, thereby, always resulting in an actual net loss. Exs. C-8 & 10; Ex. G-52, App. N; Tr. 979-82. Mr. Stebbins testified that it is important to account for the apportioned value of machinery that is attributable to the site. Tr. 943, 1023-25. In effect, Copar attempted to treat such equipment costs as sunk costs, and Mr. Stebbins testified that this is incorrect with respect to equipment that is portable. Ex. C-43; Tr. 1808-09.

***224** Decision at 10. Stebbins testified that "[n]one of the evaluated scenarios demonstrate any potential for profit." Tr. 962. He concluded that Copar would need to produce and market about 30,000 tons of laundry grade pumice per year for 10 years to break even. *Id.*

Stebbins testified that in each of the scenarios he modeled, the mining operations resulted in a loss. Tr. 928. Such negative results reflect the fact that total market size for both products and the revenue they would generate cannot support the total capital and operating expenses. Stebbins testified that two factors impact profitability: (1) the production rate and (2) the amount of waste that must be mined and moved to obtain that production. Critical here is the fact that Copar is allowed to market only +3/4" pumice, meaning that only a fraction of the deposit on the El Cajete mine can be sold. As noted by the Government, "Copar simply does not have a large enough market or a high enough revenue stream to support a profitable operation where only a small fraction of the deposit can be sold." Answer at 26.

****37** Copar argues that Stebbins' analysis is flawed because his estimates regarding market size and sales prices are unreliable. The record does not support Copar's criticism. As we have seen, he engaged in an analysis to determine the necessary market size for the most favorable of the mining scenarios to reach the break-even point over a 10-year period. Tr. 963, Ex. G-52, App. M. This break even analysis was based upon demonstrated sales prices for laundry grade pumice. Stebbins'exceedingly generous break even market estimate of 30,000 tons per year is over twice any reasonable estimate of the potential market found by the Mineral Examiners, who estimated a maximum market size of only 13,750 tons per year. *See* Ex. G-46; Tr. 777-79. Further, Stebbins' break even market exceeds what is claimed by Copar in its contracts, about 20,000 tons per year. *See* Ex. C-l. Copar did not show, or even claim, that such a break even market exists. To the contrary, the evidence indicates that the stone wash market is declining to the point of vanishing and that the biofilter market may never come to fruition, so that the likelihood that Copar could resume mining at even a marginally profitable level is questionable, at best. Stebbins even analyzed whether, based on Copar's contracts *(see* Ex. C-l), a profitable mine could be developed, using the specifications in the contracts and information in Copar's business plan. *See* Ex. C-10; Ex. G-52, App. N; Tr. 979-82. Even using Copar's contracts, three of which by Copar's own later admission are no longer in effect, Stebbins concluded that reasonable operating costs far exceed revenues, resulting in a net loss.

We agree with Judge Heffernan's conclusion that "[e]ven Copar's own most optimistic projections, do not anticipate a market approaching 30,000 tons per year, were mining to be resumed"; that "Stebbins' estimate of 30,000 tons per year of ***225** production for Copar just to break even is reasonable and well-founded"; and that "[t]here is simply not an adequate qualifying market remaining today for Copar to reach that level of break even production." Decision at 11.

3. The Government's "Bootstrapping" Argument

[6] The Government argues that Copar's "analysis contains 'bootstrapping' that must be addressed before any reliance on their analysis." Answer at 32. The Government defines the issue in the following terms: "The profitable marketability of uncommon varieties of pumice on the El Cajete deposit must be established independently from sales of common varieties. To do otherwise would be bootstrapping." Answer at 32 (citing *U.S. v. Forsythe*, 100 IBLA at 241-42). According to the Government's Exhibits 28D and 28E1, since 2002, Copar has sold only 48,930 cubic yards of pumice into the laundry and biofilter industry (41,640 laundry and 7,290 biofilter), while it sold 579,749 cubic yards for common variety uses. It is improper to rely upon revenues from common variety sales to conclude that a potentially locatable material can be mined and marketed at a profit. When there is more than one market for the mineral from a claim, and the sales in one or more of those markets would be considered sales for common variety uses, that fact must be taken into consideration when determining whether there is a discovery of a locatable mineral. The uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals (or products) may not be considered when predicting profitability.

****38** In Exhibit 43, Copar allocates and deducts costs for the "locatable" operation separate from its common variety operations at the El Cajete mine. As the Government notes, "[t]his has the same financial effect as if revenues were added from the common variety operations." Answer at 33. During the hearing, Copar's accountant, Kacie Castor, testified that Exhibit 43 was created using factors to allocate costs for producing laundry grade and common variety pumice. She stated that none of the revenue from common variety sales were included in calculating the ratio of laundry grade sales to the common variety sales. Tr. 1641, 1654-55. The Government agrees and explains:
This means that anywhere from 25% to 57% of the necessary costs for conducting the locatable operation at the El Cajete mine [were] stripped out and paid for by common variety sales in Contestees' analysis. This includes such basic and necessary costs as permitting the mine (accounting line 6000), equipment cost (accounting line 6005, 6007, 6010) and salaries (accounting line 6500). *See* Contestees' Ex. 43.

***226** Contestees Response Brief, page 21, tries to spin this by saying that no "revenues" from common variety operations were added to the revenue side. However, the Government's contention, and the Contestees' own witnesses confirm, that it was not revenue that was added but costs that were stripped out. When asked where the money would come from to pay these costs, Contestees admitted these costs of the locatable operation must be paid out of common variety sales (Tr. Pp. 1640-1641, 1654-1655).

Answer at 33; *see* Ex. C-43. Copar asserted that "[i]n determining the amount of net profit from large pumice, Copar relied upon its general ledgers which were contemporaneously maintained during the ordinary course of business ...." Answer at 33; *see* Tr. 1399-1400. The accounting practice of allocating and stripping out the costs of mining laundry grade pumice, and paying those costs out of common variety sales, is inconsistent with the Settlement Agreement and *Copar v. Tidwell*.

This focus upon Copar's accounting practices is more than academic. Copar relies upon its historic business performance in claiming that it could re-establish a profitable mine. Stebbins testified that he usually answers "no" to the question of whether historical costs are the most accurate predictors of the future. Tr. 1053. In explaining why costs of production varied between his models, he pointed to the overall production rate of the operation, such as the ratio of waste material to marketable pumice. He stated that as the production rate goes down, overall costs per ton or cubic yard tend to go up due to economies of scale. Tr. 1765-69. In terms of Copar's operation, the objective is to establish Copar's historical cost for mining +3/4" pumice where it is estimated that approximately 32% of the deposit is recoverable product. Current pumice sales to laundries are exclusively of +1" bagged pumice to the remnant stone wash pumice market. *See* Government's Post-Hearing Brief at 18-20; Government's Reply Brief at 3-6; Exs. G-45 and 46. Mining for + 1" pumice would increase the ratio of waste to product, as it is estimated that only 25% of the deposit is 1" or larger. This would increase the amount of waste product to be handled that would not be available for sale. Such waste product would have to be returned to the mine site for reclamation in accordance with Copar's plan of operations. *See* Ex. G-52 at 17 for product waste percentages. The fact that there has been a

significant market decline since 2007 means that historic economies of scale will be further reduced.

****39** We are back to the problem detected by the FS soon after Copar began operations at the El Cajete mine, *i.e.*, Copar had been marketing pumice for common variety uses, whether laundry grade or not. The Government is right in claiming that if the costs of mining cannot be paid from common variety sales, then all such costs must be charged to producing laundry grade pumice. Obviously, mining and ***227** marketing laundry grade pumice would be a more costly proposition than calculated by Copar, since Copar's practice of supporting its mining operation from the sale of pumice for common variety uses would continue to be illegal. For these reasons, Copar's past mining and marketing practices provide little useful guidance in calculating costs and expenses if mining at the El Cajete mine resumed or in evaluating whether Copar can extract and market laundry grade pumice—and only laundry grade pumice—at a profit. It is for this reason that we endorse, as did Judge Heffernan, Stebbins' use of several models that were based upon reasonable assumptions, which were invariably favorable to Copar, regarding what a prudent miner would do on the mine actually being evaluated. All of his models showed Copar falling far short of earning a profit on the sale of the very limited amount of laundry grade pumice it could market, even assuming it could be marketed at a premium. We find no fault in his application of the prudent man rule.

V. *CONCLUSION*

Judge Heffernan was correct in ruling that the Brown Claims 9-12 were null and void because there was no discovery of a locatable mineral at the date of the hearing. Three distinct but related points lead to this conclusion. One, the market for laundry grade pumice had virtually disappeared by the time of the hearing, and the market for laundry grade pumice for use in the biofilter industry was de minimus. Two, the price paid for laundry grade pumice for use in an uncommon variety application, such as in the garment or biofilter industry, fell within the range of prices received for pumice sold for common variety uses. And three, Copar did not satisfy the prudent man test, *i.e.*, Copar could not reasonably expect to mine and sell locatable pumice at a profit.

When placed into the context of the Settlement Agreement reached before the Claims Court, the Tenth Circuit's application of the FS regulation in *Copar* v. *Tidwell*, and application of the *McClarty* standards, this record points with little meaningful dispute to the conclusion that there is no longer a discovery of locatable pumice on the Brown Claims. We hereby affirm Judge Heffernan's decision.

***228** Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Heffernan's decision is affirmed.

I concur:

T. Britt Price Administrative Judge

****40** James F. Roberts
Administrative Judge

***229 ADMINISTRATIVE JUDGE JACKSON DISSENTING:**

Appellants, who do business as Copar Pumice Company (Copar), have appealed from a decision that was issued by Administrative Law Judge (ALJ) James H. Heffernan on January 4, 2011 (ALJ Decision), which declared Brown Placer Mining Claims Nos. 9-12 (the Brown Claims) invalid. He did so based on his ruling that laundry-grade pumice produced by Copar from its El Cajete Mine is not locatable under the Common Varieties Act, 30 U.S.C. § 611 (2006), but even if it was locatable as an uncommon variety of pumice, he ruled that a prudent miner would not resume mining at the El Cajete Mine with a reasonable prospect of doing so at a profit, as required by the General Mining Act of 1872, 30 U.S.C. §§ 22-54 (2006). ALJ Decision at 18. The majority agrees with both of ALJ Heffernan's rulings; I do not. They affirm his decision, whereas I would reverse or set it aside. My disagreements with their legal and factual analysis are discussed below.

Factual and Procedural Background

Pumice is most commonly used for building, landscaping, and as an aggregate. The market for these common uses has long

existed and currently accounts for over 90% of domestic pumice production, with the remainder sold for stonewashing garments and "other" uses. *See* U.S. Geological Survey (USGS) 2010 Minerals Yearbook - Pumice and Pumicite; Bureau of Mines 1954 Minerals Yearbook - Pumice and Pumicite.[19] Stonewash laundries use pumice to soften, abrade, and fade newly manufactured denim garments to give them a worn look, but not any pumice will do. *See* New Mexico Bureau of Mines & Mineral Resources, "Pumice and Pumicite in New Mexico," Bulletin 140 (1994), Ex. C-l8 at 10-12. To be suitable for use by laundries, it must be hard, coarse, generally free of lithics, clay, iron oxide, and other staining minerals, and at least 0.75 inches in size. *See id.* at 10-11, 21; *see also id.* at 19 ("El Cajete pumice, because of its above average coarseness and overall acceptable physical properties, is the best pumice for laundry use."). Pumice is also used in biofilters, where bacteria and other microorganisms reside on a filter agent to treat industrial exhaust streams, which makes the filter agent the most important component in designing a biofilter because it must support large microbial ***230** populations, resist biological breakdown, and have a high moisture holding capacity to buffer fluctuations in humidity and temperature.

A. The FS Mineral Examination of the Brown Claims

Claimants located the Brown Claims in 1988, applied for patent and received a First Half Final Certificate, but before the discovery of a valuable mineral deposit could be verified for patent to issue, the Jemez National Recreational Area (JNRA) was established, which prohibited patenting and withdrew its lands from location under the mining laws on October 12, 1993, subject to "valid existing rights." 16 U.S.C. § 460jjj-2(b) (2006); *see* 16 U.S.C. §§ 460jjj through 460jjj-5 (2006). The U.S. Forest Service (FS) timely completed its examination of the Brown Claims by issuing two reports in 1995, as required by 16 U.S.C. § 460jjj-2(d) (2006).

****41** The first mineral report issued by the FS was on May 19, 1995, Ex. G-7 (1995 Mineral Report), which determined that pumice on the Brown Claims was locatable under the Common Varieties Act. Its mineral examiners analyzed sampling data and found they showed an absence of lithics and staining materials and that this deposit could yield large sized pumice (0.75 inches or greater) in the range of 33.2% to 62.0%. *See* 1995 Mineral Report at 11-21, 24-25. Using studies performed by Professor Jerry M. Hoffer, University of Texas at El Paso, they reported and concluded:

Pumice is a relatively common rock type in the western U.S., where Tertiary-aged volcanism has produced large deposits in New Mexico, Arizona, California, and Oregon. Hoffer (1992) in a study of 207 pumice deposits in the western U.S. found that only 5.3% of those deposits had "stone wash laundry quality" pumice based on tests against his criteria of abrasion loss, apparent density, surface fines, coloration and absorption capacity. The El Cajete Pumice deposit was one of those he tested and found to be suitable for laundry use. The El Cajete is unusual in that it contains relatively large pumice fragments and is generally unstained as compared to other pumice deposits generally.

....

A comparison with other pumice deposits has been made by Hoffer (1992, 1994) and these studies have shown that pumice from the El Cajete deposit is unique when compared to many other deposits in its coarse fragment size, uniformity, and lack of staining. When tested against other pumices from 207 deposits using the criteria of ***231** abrasion loss, apparent density, surface fines, coloration, and absorption capacity, it is shown to be one of only a handful which is suitable for the garment finishing industry.

Id. at 23-25. This mineral report then stated and determined: "Forest Service regulations at 36 CFR 228 Subpart C define minerals to be administered as locatable minerals as those minerals 'used in manufacturing, industrial processing, or chemical operations for which no other mineral can be substituted due to unique properties giving the particular mineral a distinct and special value.' Pumice used in the garment finishing industry is such a mineral and fits this definition." *Id.* at 25. The 1995 Mineral Report stated that garment finishing pumice sells for a premium over that paid for common pumice used in building blocks, concrete, and for horticultural purposes. *Id.*

The FS issued its second mineral report on August 30, 1995, Ex. G-8, to address whether a paying mine could be developed on the Brown Claims. It estimated garment-finishing pumice reserves of at least 2.5 million cubic yards on the claims (1.5 million tons), and based on actual cost and sales data for such pumice from the nearby Las Conchas mine, the FS mineral examiners calculated this pumice could be sold at a profit of $5.65 per cubic yard ($9.60 per ton) if a mine was developed on these claims. Ex. G-8 at 5, 13-29 (reserve calculations), 31-35 (start up costs for equipment and infrastructure and annual operating costs for mining, processing/bagging, and hauling). These data showed "a very positive internal rate-of-return of

84% and a payback period of 3.25 years." *Id.* at 35. The FS determined the discovery of a valuable mineral deposit had been made and that the elements necessary for initiating a mining contest on the Brown Claims were not present. *See id.* at 5-6.[20]

****42 *232** The FS thereafter approved a Plan of Operations for mining the Brown Claims on November 29, 1997, which was limited to a 10-year term. Ex. G-22. Copar cleared, fenced, secured access to, and opened the El Cajete Mine in 1998, from which it produced and profitably sold laundry-grade pumice for nearly 10 years. After Copar requested an extension of its approved plan in September 2005, the FS retained Peter W. Harben, Inc. (Harben), to assess the market for laundry-grade pumice. Harben reported in August of 2006 that available data showed this market was from 13,000 to 50,000 tons per year (TPY), was likely 20,000 TPY, and that Copar had the "lion's share" of this market. "Laundry-grade Pumice: Market evaluation with special emphasis on product from Northern New Mexico, USA," Ex. G-32A (Harben 2006 Report), at 49, 54. Using data from the most recent USGS Minerals Yearbook, Harben found the price for common variety pumice ranged from $14.80 per ton (horticulture and landscaping) to $23.20 per ton (building block), which was substantially less than what Copar received for laundry-grade pumice sold in bulk ($32 per ton), for export to Mexico ($193 per ton, including shipping costs), and in either 25-pound bags ($57 per ton) or 35-pound bags ($47 per ton). *Id.* at 46, 47 (citing 2005 Minerals Yearbook), 49. The FS denied Copar's extension request on January 25, 2007, and also directed it to submit a new Plan of Operations.

B. The FS Mineral Reexamination of the Brown Claims

While Copar was preparing a new plan of operations for the El Cajete Mine, the FS was reexamining the Brown Claims. Diane Nowlin Tafoya and two other geologists with the FS reexamined the Brown Claims and issued a mineral report on November 9, 2007, Ex. G-32 (2007 Mineral Report). They confirmed Harben's finding that only the El Cajete Mine and one other domestic mine were producing laundry-grade pumice for stonewash laundries, but unlike Harben, the FS estimated that market at only 15,000 TPY and opined that Copar could sell no more than 10,000 TPY of its pumice into that market. *See* 2007 Mineral Report at 28-32; *compare* Harben 2006 Report at 54 *with* 2007 Mineral Report at 38. The Mineral Report verified the "characterization of the El Cajete as documented in the previous 1995 validity examination" and then stated:

This report does not question the pre-mining reserves of the pumice deposit or the physical characteristics of the deposit as documented in the 1995 validity examination. The pumice on the claims is unstained, white, and relatively lithic free, and the large fragment sizes of the pumice make it suitable for use in the stonewash industry.

2007 Mineral Report at 18. Rather than accept the 1995 finding that this deposit possessed properties uniquely suited for stonewashing garments, which rendered its pumice locatable for that uncommon variety use under this Department's "dual ***233** standard" for determining whether a mineral deposit has a distinct and special value under the Common Varieties Act, the FS considered only the second prong of that standard, which requires that it command a "premium price" when sold "for a 'common variety' use." *United States v. Foresyth*, 100 1BLA 185, 245 (1987)[ee] (citing *U.S. Minerals Development Corp. (Minerals Development)*, 75 I.D. 127 (1968), and *McClarty v. Secretary of Interior (McClarty)*, 408 F.2d 907 (9th Cir. 1969)); *see* 184 IBLA at 185.

****43** The FS examiners found the 2006 posted price for Copar pumice sold for common variety use was $9.50 to $13.50 per cubic yard ($15.50 per cubic yard for a single pick-up truck load of large-sized pumice), whereas the posted price for laundry-grade pumice sold in bulk from the El Cajete Mine was $19.00 per cubic yard. 2007 Mineral Report at 27. Based on a review of selected Copar invoices for 2001 through 2004, they opined that actual bulk sales of laundry-grade pumice in 2006 were "closer to $16.50 per [cubic yard]," which they found was ""only slightly above" the price paid for a single pick-up load of large-sized common variety pumice ($15.50 per cubic yard). *Id.* at 28. The FS concluded by recommending that a mining contest be initiated, charging that the Brown Claims do not contain an uncommon variety mineral material subject to location under the Common Varieties Act. *See id.* at 45 ("[Copar pumice] is principally valuable for use as lightweight aggregate for which ordinary pumice may be used"); 184 IBLA at 186 ("With no higher price to reflect the deposit's unique and special value, the Examiners believed that an uncommon variety of pumice no longer existed on the claims and the pumice was no longer locatable.").[21]

C. The Contest Proceeding

The Government filed its contest complaint on February 5, 2008,[22] charging that pumice on the Brown Claims was not locatable under the Common Varieties Act, and adding a second charge: "Minerals have not been found within the limits of

the claims in sufficient quantities and/or qualities to constitute the discovery of a valuable mineral deposit." Contest Complaint at 2. The Government timely filed a Motion to Define Legal Issues and supporting brief (Government Brief) to ensure that ***234** "contestees are adequately apprised of the facts and government's position thereon" on each charge of its contest complaint. Government Brief at 13.

The Government explained that for this pumice to be locatable under the Common Varieties Act, it must have unique properties giving it "a distinct and special value, which is reflected by the mineral either commanding higher prices due to those properties than the market pays for ordinary, common varieties of the mineral, or enables it to be used for something which ordinary deposits of the mineral cannot be used." Government Brief at 11 (citing *United States* v. *Multiple Use, Inc. (Multiple Use)*, 120 IBLA 63, 77-78 (1991));[ff] *see id.* at 13 ("[its] mineral must actually be put to that specific use, not merely be acceptable for a certain use") ("If the common variety material is not used for a special purpose, [it] must command a higher price in the market for the uses to which common varieties are put."). As to its second charge, the Government assured Copar that it was limited to whether the "small quantity of locatable [by law block pumice]" would warrant a reasonable person expending the effort to develop a paying mine on these claims. *Id.* at 12-13. Copar responded by filing a Motion in Limine and a Motion for Summary Judgment. ALJ Heffernan addressed these motions by denying both Copar motions and ruling that the contest hearing would address "whether the subjects claims are continuing to produce uncommon variety material in the contemporary market place" and that he would then receive evidence on "the current, updated validity of the [Brown Claims]." Order dated July 21, 2009, at 6, 7, 8.

****44** After two hearing postponements, one at the Government's request (due to the unavailability of its expert witness) and the other due to discovery issues, ALJ Heffernan rescheduled the contest hearing for June 2010 and directed the parties to "exchange witness and exhibits lists by March 15" and that they complete discovery by April 15. Order dated Jan. 19, 2010, at 2. Witness and exhibit lists were timely exchanged, but after discovery disputes arose during a status call on April 30, ALJ Heffernan stated he would postpone the hearing if they were not resolved by their next status call on May 21. Order dated Apr. 30, 2010. The Government belatedly responded to Copar discovery requests on May 21, 2010, by then providing it with a 500-page report by a Scott Stebbins, a witness not previously identified on its witness list, "Capital and Operating Cost Estimates and Economic Evaluations for the Brown Placer Claim Group" (May 17, 2010), Ex. G-32 (Stebbins Report). Since no status call was held with ALJ Heffernan, the scheduled contest hearing began on June 7, 2010.

Shortly before the April status call with ALJ Heffernan, the Court of Appeals affirmed the District Court's upholding of a 2003 notice of noncompliance issued to Copar by the FS for its failing timely to comply with an order requiring it to prove that all laundry-grade pumice produced from the El Cajete Mine was sold to and used ***235** by stonewash laundries. *Copar Pumice Co., Inc. v. Bosworth*, 502 F. Supp. 2d 1200 (D.N.M. 2007), *aff'd Copar Pumice Co., Inc. v. Tidwell (Copar)*, 603 F.3d 780 (10th Cir. 2010). The Federal courts upheld that notice of noncompliance under applicable FS rules because the record showed that at least some laundry-grade pumice from the El Cajete Mine had been crushed and sold for common variety use to established customers after Copar was denied access to its Guava Canyon Mine by the FS, from which it produced common variety pumice for common variety use. 603 F.3d at 791, 795 (citing 36 C.F.R. § 228.41). However, the Court of Appeals noted that since laundry-grade pumice from the El Cajete Mine "commands a price significantly higher than the price it would fetch if sold for common variety applications," it expected that price differential "would be a significant, if not dispositive, step towards verifying" Copar sales into a qualifying market, as required by FS rules. *Id.* at 800. The Government thereafter filed suit seeking trespass damages for the unauthorized sale of common variety pumice by Copar from its El Cajete Mine. *See United States* v. *Copar Pumice Co., Inc.*, Civ. No. 1:09-CV-01201-JAP-KBM (D.N.M.); *see also* Motion to Supplement the Administrative Record, filed in IBLA 2011-98 on May 23, 2013.

1. Evidence Presented by the Government at the Contest Hearing

****45** To show that laundry-grade pumice produced from the El Cajete Mine is of common variety, the Government relied on the 2007 Mineral Report, the FS Production Verification Report that reviewed Copar sales data, and an update of the 2006 Harben Report,[23] which are summarized below:

The FS Mineral Report: Tofoya, a co-author of the 1995 and 2007 Mineral Reports, testified that while Copar pumice has unique properties for stonewashing garments, which are located in a deposit with "an unusual amount of pumice larger than three-quarter inches," it is no longer of uncommon variety opined because its price no longer "far exceeds" the price for common variety pumice. Tr. 474, 545. However, Tofoya admitted she did not compare the Copar price for its laundry-grade pumice with "dirty" or general run pumice used as aggregate or pumice from any ***236** other deposit unless it was similar to

Copar pumice (e.g., free of staining and lithic materials). Tr. 652-53, 693; *see* Tr. 457-58, 467-80, 556-57, 642-44.

The FS Production Verification Report: Larry Gore, an employee of the FS, reviewed haul tickets, bills of lading, and invoices for the period April 2002 through February 2008 that had been provided by Copar in response to the Government's discovery requests in this proceeding. *See* Ex. G-28B at 1, 4. As explained at the hearing, he placed each sale into either a laundry, non-laundry, or uncertain use category and then used sale invoices to populate and create a database. *See* Exs. G-28 (Production Verification Report), G-28B (Production and Sales Data Tabulation Report); Tr. 163, 166, 170-71, 173-76, 179, 211-17. To be placed in the laundry-use category, it must have been in bags and purchased by an entity in the stonewash laundry industry, which excluded all bulk sales and all bagged sales to pumice brokers. *See* Tr. 325-27. Gore therefore placed only 24,468 tons of bagged pumice into the laundry-use category and 292,085 tons into his non-laundry and uncertain use categories, which excluded the 63,037 tons of laundry-grade pumice sold in bulk to Garcia Trucking, Inc. (Garcia).[24] *See* Ex. G-28D; Tr. 142, 164-65, 296, 327.

The Harben Report Update: Harben and Lobdell used the FS Production Verification Report, related FS data, and other information to update the 2006 Harben Report and quantify markets for laundry-grade pumice that could be accessed by resumed production from the El Cajete Mine. See Ex. G-46 (Laundry-grade Pumice: Review of Available Market Information, Apr. 12, 2010) (2010 Harben Report), at 8-9, 19; Tr. 719, 729, 1923-26, 1960-61, 1988. Based on Gore's end-use classifications, their report found the market for laundry-grade pumice was 19,500 TPY in 2006 and 2007.[25] 2010 Harben Report at 24, 26-27, 30-31. However, since domestic laundries responded to the unavailability of Copar pumice in 2008 by using alternatives, this report concluded: "Copar is capable of accessing markets for 5,000 to 7,500 tons of laundry-grade pumice for export (mainly Mexico) plus 2,000 to 2,500 tons for domestic consumption, for a total of 7,000 to 10,000 TPY," plus a market for its use in biofilters of between 3,000 and 4,500 TPY, which could "fluctuate from zero to more than 10,000 TPY depending on energy prices and the willingness of regulatory agencies to favor biolfilters." *Id.* at 9; *see id.* at 27-28, ***237** 60-64, 66; Tr. 725-26, 728, 751-55, 1948, 1951. In sum, they estimated Copar could access a laundry-grade pumice market of between 10,000 and 14,500 TPY.[26]

****46** To show a valuable mineral deposit does not currently exist on the Brown Claims, the Government relied exclusively on Stebbins' testimony and the Stebbins Report. His firm, Aventurine Engineering, Inc., was retained by the Government to estimate the cost and profitability of mining the Brown Claims over 10 years. *See* Stebbins Report at 13. He identified a "base case scenario" of 17,500 TPY and 11 other scenarios in his report. *See id.* at 1-13.[27] Each scenario was evaluated by using a proprietary software model that used engineering calculations and algorithms to identify equipment and labor requirements and their costs. Tr. at 900-03. Using assumed prices for laundry-grade pumice, the report presented the economics for developing a new mine on the claims. *See* Stebbins Report, Appendices A-M.

Stebbins explained his first step was to identify start-up costs. Although the El Cajete existed and necessary facilities, improvements, and equipment were present and available, Stebbins assumed the claims were undeveloped and unmined, all new equipment and facilities would be purchased, installed, and constructed, and that it would take 3 years before first production from such a new mine. Stebbins Report at 19-23; *see id.* at 20 ("estimates assume [this mining] prospect is raw and that development has yet to take place"). Based on these assumptions, his model estimated start-up costs of $2,451,100 under his base-case scenario: $848,400 for new equipment (less salvage after 10 years); $424,500 for on-site improvements (*e.g.*, $219,200 to fence the claims), facilities, materials, and labor; $223,600 for off-site facilities and equipment to process laundry-grade pumice for sale; $193,900 to access and prepare the site; $60,500 for working capital; $148,700 for future reclamation costs; plus added costs of $738,900, which were based on a percentage of new equipment and certain other costs that totaled $3,079,000 (i.e., $307,900 for unexpected problems (10%), $246,300 for design, engineering, and planning (8%), and $184,700 for project management, permitting and legal fees (6%)). *See id.* at 1, 19; Stebbins Report, Appendix A at 1.

***238** His second step was to estimate net operating revenues from mining a deposit that contains 32.5% laundry-grade pumice and had 1% breakage at the mine. *See* Stebbins Report at 1. His program identified labor and equipment requirements to produce 17,500 TPY of saleable product under the base-case scenario *(e.g.*, 5 workers to mine and process laundry-grade pumice). He assumed labor costs would be at prevailing wage rates under the Davis Bacon Act, 40 U.S.C. §§ 3141 through 3147 (2006) (Davis-Bacon wages) that were published for the State of New Mexico, which his software used to estimate labor costs of $19.44 per saleable ton. *See* Stebbins Report at 20;[28] Stebbins Report, Appendix A at 1, 23. Stebbins' model estimated equipment operating and miscellaneous supply costs at $10.47 per ton, administrative costs of $7.81 per ton, and miscellaneous expenses of $3.77 per ton. His report therefore estimated total operating expenses of $41.49 per saleable ton and $724,518 per year to produce 17,500 TPY. *See* Stebbins Report, Appendix A at 1, 28. Based on assumed prices, it

estimated gross pumice revenues of $931,000, which would result in net operating revenue of $206,482 per year (gross revenue less total operating costs) under his base case scenario. *See id.*; Tr. 961.[29]

****47** The Stebbins Report estimated that a new mine under his base case scenario would have an accumulated debt burden of $3,731,041 for new equipment and start up costs before it produced and sold any pumice, assuming it would take 3 years to open that mine. *See* Stebbins Report at 23-24; Stebbins Report, Appendix A at 28-31. His software then executed a cash flow analysis to evaluate its profitability, but since it estimated net operating revenues of only $206 482 per year it showed a net loss of $507,125 at the end of Year 13. *Id.* Similar results were reported for 10 other scenarios, but not for its 30,000 TPY "break even" scenario (Appendix M) or the "contract" scenario he prepared for the hearing (Appendix N). *See* Stebbins Report at 13.

239** ***2. Evidence Presented by Copar at the Contest Hearing

Copar presented evidence through the testimony of its largest bulk purchaser of laundry-grade pumice (Garcia),[30] the president of PPC's biofilter division (Scot Standefer), an expert on mining engineering and appraisals and on mineral valuation (William Jennings), its accountant (Kacie Caster), an accepted accounting expert (William Takala), and the president of Copar (Kelly Armstrong).

Garcia bought Copar pumice exclusively for the laundry industry for over 20 years. Tr. 1486; *see* Tr. 1519 ("all the pumice that I purchased from Copar Pumice went to the laundry industry"). After selling it directly to stonewash laundries, he began selling bulk pumice to Pumice Works, Inc., who re-screened, bagged, palletized, and shipped it to its laundry customers. Tr. 1496, 1504. Based on bills of lading, conversations, and site visits at Pumice Works, Garcia testified that this pumice was not only going to Los Angeles, but also to El Paso, and "back east." Tr. 1496. When asked on cross-examination whether Pumice Works used Copar pumice to manufacture faux stone, he responded: "No, sir, because the pumice for the garment industry, I mean, it's expensive. Why would you use a Grade No. 1 pumice to make an artificial rock? ... You know, it would be useless. You would be losing money." Tr. 1523.

Standefer testified that after several years of study by PPC, it found that Copar pumice was unique for use in biofilters because of its large particle sizes, ability to hold more water than other natural agents, and better support for healthy microbial communities, properties not present in any other pumice. Tr. 1070-72, 1082-83, 1095, 1100-02, 1108, 1114; *see* 2010 Harben Report at 28, 64. Standefer added that Copar pumice is more durable (less breakage during transport), lasts longer than other naturally-occurring filter media, and can be easily washed when biomass begins to clog a biofilter. Tr. 1074, 1077, 1082-83. He stated Copar pumice is its "preferred option," opining that the demand for biofilters and Copar pumice will undoubtedly increase as air pollution laws become ever more stringent. Tr. 1094-95, 1104, 1106.

****48 Jennings** works with Behre Dolbear and Co., a consultant to the minerals industry, and was the principal author of its January 2010 report entitled "Study of Copar Pumice's Pumice Mining and Sales Operations in New Mexico," C-14 (Dolbear Report) at 3; *see* Tr. 1213, 1231. Based on his review of Copar records and accounts, he identified its bulk sale price for laundry-grade pumice in 2004 ($15.50-16.75 per ***240** cubic yard; $26.45-$28.50 per ton) and 2008 ($19.50-$20.00 per cubic yard; $33.15-34.00 per ton). Dolbear Report at 12,13; Tr. 1231-36, 1251-52. Based on USGS data for 2004-2008, he identified the price for common variety pumice sold for use in building blocks and concrete at $11.67 per ton in 2008. Tr. 1241; *see* Dolbear Report at 8. Comparing the price Copar received from Garcia for laundry-grade pumice sold in bulk ($20.00 per cubic yard; $34.00 per ton), he concluded it sold for nearly three times more than common variety pumice. Tr. 1243-44, 1271. Since he opined that the market for laundry-grade pumice was "at least as big as what Copar sells," which had averaged 18,000 TPY, he concluded that a person of ordinary prudence would be justified in expending further time and resources because this mineral could be extracted and sold at a profit. Tr. 1272; *see* Dolbear Report at 14-19; Tr. 1254-55, 1258-61, 1278, 1280, 1281, 1285.

Caster, Copar's in-house accountant, prepared laundry-grade pumice revenue and expense summaries for 2004, 2005, 2006, and 2007, which Copar used to prepare its Business Plan that was submitted in this mining contest. *See* Ex. C-10, Appendix C (Business Plan Financials); Tr. 1635-38; Tr. 1397-1402 (Armstrong). Using financial records contemporaneously prepared in the ordinary course of its business (e.g., general ledgers), she identified Copar expenses to produce laundry-grade pumice from the El Cajete Mine and process it at the Espanola plant,[31] allocating operating expenses based on production of laundry-grade pumice and overhead/administrative expenses on a pro rata basis between and among its several, mines and processing facilities.[32] Tr. 1640-41; *see* Business Plan Financials at 1-4; Tr. 1716-26 (Takala testimony verifying the

reasonableness of her allocations). She divided revenue and allocated expenses by what was produced, processed, and sold each year to identify gross profits for 2004 ($3.33 per cubic yard; $5.66 per ton), 2005 ($3.96 per cubic yard; $6.33 per ton), 2006 ($7.22 per cubic yard; $12.27 per ton), and 2007 ($4.41 per cubic yard; $7.50 per ton). Business Plan Financials at 1-4; *see* Tr. 1688-92; Ex. C-41 (corrected). The Government challenged her expense allocations until ALJ Heffernan ruled they were reasonable, adding that if the Government claims they were "erroneous or misrepresentative," it must provide evidence to support that claim. Tr. 1701-02; *see* Tr. 1654-1700. The Government offered no such evidence.

****49 *241 *Takala*** was accepted as an accounting expert by ALJ Heffernan. He testified that he prepared Copar's tax returns, its financial records were true, accurate, had consistently segregated laundry-grade pumice from common variety pumice (since the mid-1990s), and that all equipment used to mine and process laundry-grade pumice had been accounted for as depreciation on Copar's annual tax returns. *See* Tr. 1712-26.

Armstrong, Copar's president, testified and largely rebutted Stebbins' assumptions and the estimates generated by his software and reflected in the Stebbins Report. Rather than take three years before mining could be resumed at the El Cajete Mine, she testified that it would take less than a month because it was already fenced, already had an access road, over half of the acreage remaining to be mined had been cleared, it had a state-issued air quality permit, its plans of operations were pending before the FS, and that its Espanola plant was ready to resume processing laundry-grade pumice. *See* Tr. 1321, 1328-29, 1333-34, 1341; *see also* Exs. C-7, C-9. She testified it would cost Copar no more than $47,400 to reopen the El Cajete Mine (i.e., pay the bill for an updated environmental impact statement ($35,000), improve access ($5,000), re-erect an onsite screening plant ($4,000), and remove overburden ($3,400).[33] Tr. 1325,1330-32, 1343, 1426-27, 1599. Rather than pay the Davis Bacon wages assumed by Stebbins, she testified that Copar actually paid its equipment operators $14.25-14.75 (rather than $19.21 to $22.27) per hour, $9.00 (rather than $15.44) per hour for laborers, and its mechanics $20.00 (rather than $28.10) per hour. *Compare* Tr. 1424-25 *with* Stebbins Report at 20. Based largely on its labor costs, she testified that Copar would make a profit in its first year of resumed operations at the El Cajete Mine. Tr. 1426. As to the future development of the proposed El Cajete II Mine, Armstrong stated it would require less than $75,000 to open that mine (i.e., up to $10,000 for cutting a new road, $8,000 for fencing, $15,000 for removing trees and overburden, and $4,000 for moving and reinstalling its on-site screening plant). Tr. 1342, 1426-27.

Armstrong discussed the profitability of resuming laundry-grade pumice at the El Cajete Mine, which was summarized in its Business Plan Financials. Tr. 1397-1402. Using 2007 as an example, she testified that Copar sold approximately 29,899 cubic yards of laundry-grade pumice for $775,518.43, with costs of $524,204.09, which showed a gross profit of $251,314.33 ($4.41 per cubic yard; $7.50 per ton). Tr. 1410-11, 1475, 1654-56; *see* Ex. C-l (Business Plan Financials) at 1. Based on ***242** Copar contracts identified by Stebbins in Appendix N to his report and recent inquiries, she anticipated selling nearly 53,000 cubic yards (31,270 tons) of laundry-grade pumice per year at an average price of $29.52 per yard, and using actual operating expenses for 2007 and a 10% adjustment factor, she projected that Copar would realize a net profit of $365,000 per year ($6.93 per cubic yard; $11.78 per ton). Tr. 1417-22, 1425; *see also* Business Plan Financials; Exs. C-11 (corrected), C-42 (corrected); *see also* Tr. 1732-33 (Takala testimony that this 10% adjustment factor was generous, "considering that some of the costs of living for Social Security was zero in that period of time.").

****50** Armstrong also testified that Copar's actual bagging and palletizing costs were substantially less than were assumed by Harben in its 2010 estimate of the price paid for Copar pumice sold in 25 and 35 pound bags. She testified that 25-pound bags sold for $1.04 per bag in 2007 and that their actual bagging and palletizing costs were $0.45 per bag (i.e., $0.18 for labor, $0.20 for the bag, and $0.07 for the pallet), which resulted in its pumice selling for $0.59 per 25-pound bag ($41.10 per ton), whereas Harben assumed higher bagging/palletizing costs to estimate that pumice sold for only $15 per ton. *Compare* Tr. 1874-76 *with* 2010 Harben Report at 31. As to 35-pound bags, they were selling for $1.35, with bagging and palletizing costs of $0.52 per bag (i.e., $0.20 for labor, $0.25 for the bag, and $0.07 for the pallet), which resulted in its pumice selling for $0.83 per 35-pound bag ($40.91 per ton), whereas Harben estimated that pumice sold for only $27.10 per ton. *Id.*

THE ALJ DECISION ON APPEAL

ALJ Heffernan declared the Brown Claims were "invalid, null and void" on January 4, 2011. ALJ Decision at 18. He first ruled the claims must contain a mineral material that sells for a "substantial multiple" over the price paid for common pumice sold for common variety purposes. *Id.* at 7. While ALJ Heffernan found Copar sold its laundry-grade pumice in bulk for $19.00 per cubic yard ($32.20 per ton), he concluded it was not at a substantial multiple over the posted prices obtained by the FS from its survey of selected pumice producers who sold their laundry-grade pumice for common variety uses.[34] He

therefore ruled this pumice ***243** was of common variety and not locatable under the Common Varieties Act. *See id.* at 6, 7, 12.

ALF Heffernan also addressed whether the claims contain a valuable mineral deposit, an issue he framed as being whether a sufficient market currently exists for a prudent man to expend the effort necessary to produce laundry-grade pumice from the Brown Claims with a reasonable prospect of doing so at a profit. *See* ALJ Decision at 5, 6, 8-9. He gave "considerable deference" to Stebbins and his report and disregarded Copar's evidence on the profitability of its operations at the El Cajete Mine. *Id.* at 9; *see id.* at 10-11. He found Stebbins' break even scenario of 30,000 TPY to be "reasonable and well-founded" and that even Copar's "most optimistic projections do not anticipate a market approaching [30,000 TPY]." *Id.* at 11. He separately considered the biofilter market but found it was "minuscule" and "a far cry from the 30,000 [TPY] that Mr. Stebbins cited as the break even sales point." *Id.* at 15, 16. He dispensed with Copar's reliance on its 2008 and 2010 contracts, because three "may no longer be in full force and effect" and the two do not include penalties if the purchasers refuse to accept delivery, as well as its business plan and projected revenues because they did "not take account of all necessary expenses." *Id.* at 17.

****51** Copar timely filed a Notice of Appeal with ALJ Heffernan and requested that he reopen the hearing record and receive additional evidence because neither Stebbins nor his 500-page report were disclosed until two weeks before the hearing, which gave them "inadequate time to retain an expert." Motion for Reconsideration filed on Feb. 3, 2011, at 2. After ALJ Heffernan denied their motion, appellants filed a Motion to Remand and Reopen the Hearing with an attached exhibit prepared by Andrew Knudtsen, Economic & Planning Systems, Denver, Colorado, to further support their claim that a prudent miner would reopen the El Cajete Mine, which the Government opposed. Appellants recently filed a Motion to Supplement the Administrative Record with deposition testimony by Gore in the currently pending trespass damages lawsuit pending in the New Mexico Federal District Court, which they assert shows that the laundry-grade pumice market estimated by Harben was based on a grossly erroneous assumption that virtually none of the bulk sales as to Garcia were for stonewash laundry use, but the Government opposed that motion as well.

***244** *DISCUSSION*

Appellants focus on each of the key issues decided by ALJ Heffernan, contending that their laundry-grade pumice is uniquely suitable for use by stonewash laundries and in biolfilters and that it also commands a higher price than common pumice. Statement of Reasons (SOR) at 17-25. They also contend that since the El Cajete Mine had been profitable for years and was profitable in 2007, it is reasonable to expect that it will be profitable in the future. *Id.* at 25-36. The Government counters by claiming that ALJ Heffernan properly found its pumice was of common variety because it did not sell for at least 3 times the price paid to certain pumice producers for their pumice when sold for common variety uses. Answer at 12-22. It also contends that Stebbins and his report are sufficient to support his ruling that a prudent miner would not expend the effort necessary to open a mine on the Brown Claims with a reasonable expectation of developing a paying mine. *Id.* at 25-33.

The majority agrees with the Government and affirms ALJ Heffernan's ruling that laundry-grade pumice from the Brown Claims is common pumice because it did not command a premium over the price paid for pumice sold for common variety uses. They also affirm his ruling that there is an insufficient market into which that pumice could be sold at a profit, even if it is locatable as an uncommon variety of pumice. I respectfully disagree with their view of the law and the facts in this case and separately address whether the Brown Claims contain an uncommon variety Pumice deposit and if so whether a prudent miner would reopen the El Cajete Mine with a reasonable expectation of doing so at a profit.

I. WHETHER THE DEPOSIT ON THE BROWN CLAIMS HAS A DISTINCT AND SPECIAL VALUE UNDER THE COMMON VARIETIES ACT

****52** Common variety deposits of sand, stone, gravel, pumicite, and pumice are not subject to location under the Common Varieties Act unless they have "some property giving it distinct and special value." 30 U.S.C. § 611 (2006). Its legislative history was summarized in *United States v. Kaycee Bentonite Corp.*, 64 IBLA 183 (1982),[gg] wherein we stated:

A House Report on an early version of the bill [that later became the Common Varieties Act] included the following characterization by this Department of the minerals which would no longer be subject to location:

Many of these commonplace materials are found in deposits of varying thickness over the earth's surface. They can be removed usually by stripping the surface in a ***245** very short period of time. Those genuinely interested in the use or sale of these materials ordinarily have no real interest in title to the land itself. *The value of such materials is difficult to ascertain,*

moreover, since it depends so much on incidental factors like the proximity of the deposits to prospective consumers, local needs, and the like, rather than on any generally recognized value of the materials such as may be ascribed to valuable deposits of gold, coal, or similar minerals.

H.R. Rep. No. 306, 84th Cong., 1st Sess. 3 (1955) (emphasis added). Congressman Engle, Chairman of the House Interior Committee and a sponsor of the bill which was enacted, explained why that bill would prohibit future location of claims for common variety minerals:
The reason we have done that is because sand, stone, gravel, pumice, and pumicite are really building materials, and are not the type of material contemplated to be handled under the mining laws, and that is precisely where we have had so much abuse of the mining laws, because people can go out and file mining claims on sand, stone, gravel, pumice, and pumicite taking in recreational sites and even taking in valuable stands of commercial timber in the national forests and on the public domain.

101 Cong. Rec. H 7454 (daily ed. June 20, 1955) (emphasis added).

64 IBLA at 209-10 n.10. The Department issued rules to "define 'common varieties' consistent with the expressed intent of the Congress as set forth in the reports of the respective Committees on Interior and Insular Affairs," 27 Fed. Reg. 9137, 9137-38 (Sept. 14, 1962), which then stated:

> "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possesses a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation.

****53 *246** 43 C.F.R. § 185.121(b) (1963); *see also* 43 C.F.R. § 185.121 (1960); 21 Fed. Reg. 7618 (Oct. 4, 1956).

As stated in its headnote to *Minerals Development*, the Department interpreted this rule and the Common Varieties Act and then held:
To determine whether a deposit of building stone or other substance listed in the act of July 23,1955, is of a common or uncommon variety, there must be a comparison of the deposit with other deposits of similar type minerals in order to ascertain whether the deposit has a property giving it a distinct and special value. If the deposit is to be used for the same purposes as minerals of common occurrence, then there must be a showing that some property of the deposit gives it a special value for such use and that this value is reflected by the fact that the material commands a higher price in the market place. If, however, the stone or other mineral has some property making it useful for some purpose for which other commonly available materials cannot be used, this may adequately demonstrate that it has a distinct and special value.

75 I.D. at 127; *see* 75 I.D. at 134, 135. The Board succinctly restated this "dual standard" in *Foresyth*, 100 IBLA at 246, wherein we held "special value can be demonstrated either by sales for uses which require particular characteristics or by an increase in marketplace price if sold for 'common variety' uses." 100 IBLA at 245. Since uncommon use and premium price for a common variety use are separate standards, we found limestone suitable for an uncommon use as rock dust to be of uncommon variety and that it would also be of uncommon variety if it sold at a "premium" for common variety use as fill or to stabilize soils. 100 IBLA at 247; *see id.* (a price double that paid for common limestone sold for common variety use is a sufficient premium for it to be of uncommon variety). This "dual standard" was also at issue in *Multiple Use*, which involved the locatability of pumice on two contested mining claims.

The ALJ in *Multiple Use* declared the White Vulcan No. 1 claim invalid because its pumice was sold only for common

variety uses and did not command a "meaningful premium over common variety pumice," whereas he determined pumice from the White Vulcan No. 2 claim was of uncommon variety because it was suitable to stonewash garments. *Multiple Use*, 120 IBLA at 101; *see id.* at 85-97. The FS contended on appeal that Multiple Use had not shown its pumice has unique properties required to stonewash garments or that it "command[ed] a premium, when compared with other pumice sold for stone-washing." 120 IBLA at 98. The Board disagreed, holding that the FS "incorrectly ... contends that Multiple Use must ***247** show [its] pumice is unique in the stone-washing industry" and that the claimant was not required to compare the properties of its pumice with other pumice, "unless and until" the Government showed stonewashing is "a common variety use" or that "any pumice could [be used to stonewash garments]." 120 IBLA at 102, 103.[35] We therefore affirmed the ALJ because the record supported his finding that this pumice "had a unique combination of properties making it suitable for use in the stone-washing industry," which we found was adequately demonstrated by the fact that "users of pumice for stone-washing denim are willing to pay 10 times the going rate for common variety pumice suitable for stone-washing garments." *Id.*[36]

****54** The majority recognizes that "end use" determines whether a mineral material is of uncommon variety. 184 IBLA at 196. Thus, laundry-grade "pumice is uncommon only if it is actually used in an application that utilizes its distinct and special value," but it is of common variety if "used for construction or other uses" not requiring any unique properties (unless it commands a premium price for such a common variety use). *Id.* Although apparently recognizing that the Department's "dual standard" applies, they largely ignore "sales for uses which require particular characteristics" *(i.e.*, to stonewash garments or produce biofilters) and, like ALJ Heffernan, focus exclusively on the second prong of that standard and whether this commanded a premium over common pumice sold for "'common variety' use." *Foresyth*, 100 IBLA at 245. I disagree not only with their affirming ALJ Heffernan's failure to address both prongs of the "dual standard" for determining "distinct and special value" under the Common Varieties Act, but also with the majority's finding that the Government met the second prong by comparing historic pumice prices in an attempt to show that a premium would not be paid for laundry-grade pumice over common pumice sold for common variety use, which are separately addressed below.

***248** *A. The Record Shows El Cajete Pumice is of Uncommon Variety for Use to Stonewash Garments and Produce Biofilters*

The Department has long recognized, consistent with the "expressed intent" of Congress when it enacted the Common Varieties Act, that use of a mineral material "in a manufacturing, industrial, or processing operation" is to be treated differently from mineral materials sold for construction, construction-related, and other common variety uses *(e.g.*, as fill or for horticulture purposes). 43 C.F.R. § 185.121(b) (1963); 27 Fed. Reg. at 9138; *see Minerals Development*, 75 I.D. at 127, 134, 135; *Foresyth*, 100 IBLA at 245; *see also* Government Brief at 11, 13; 184 IBLA at 192 n.8, 196. Thus, a mineral material is of uncommon variety if it has unique properties required by and sold for an uncommon variety use, but if sold for a common variety use, it must command a premium over common mineral materials sold for that use.

The 1995 Mineral Report determined that laundry-grade pumice from the Brown Claims was of uncommon variety if actually sold to stonewash garments, a determination the FS did not question when it reexamined the claims in 2007. *See* 1995 Mineral Report at 23, 25; 2007 Mineral Report at 18. While the Government conceded that laundry-grade pumice from the El Cajete Mine would be of uncommon variety if it has properties enabling "it to be used for something which ordinary deposits of the mineral cannot be used," it presented no evidence questioning the 1995 uncommon variety determination made by the FS for pumice used to stonewash garments and proffered no evidence to show stonewashing is a common variety use or that any pumice could be used by stonewash laundries. Government Brief at 11 (citing *Multiple Use*, 120 IBLA at 77-78). Based on the FS Mineral Reports, absent any proffered evidence to the contrary, I find Copar preponderated in showing that laundry-grade pumice produced from its El Cajete Mine that is sold to stonewash garments (or to produce biofilters) is of uncommon variety under the first prong of the dual standard for determining distinct and special value under the Common Varieties Act. The majority largely ignores that prong, addressing it only indirectly by questioning the size of those markets, and affirms ALJ Heffernan's ruling under only the second prong of that standard, whereas I would reverse his ruling based on the evidence presented to him.

B. *The Record Shows Laundry-Grade Pumice Sold to Stonewash Garments and/or to Produce Biofilters Would Command a Premium Over Common Pumice Sold for Common Variety Uses*

****55** The most common and typically used source of information to compare prices for determining whether a particular mineral material commands a premium when sold for a common variety use is to compare its price with common, general

run ***249** mineral materials sold for that use. *See, e.g., Multiple Use*, 120 IBLA at 93, 102; 2010 Harben Report at 29-30; 2006 Harben Report at 47; *see also* SOR at 13. Rather than use USGS survey data reported in its 2006 Minerals Yearbook,[37] the FS mineral examiners obtained pricing information from six selected pumice producers. Two of them, California Lightweight Pumice (CLP) and Arizona Trufflite,[38] were selling their laundry-grade pumice to stonewash laundries and/or for common variety use at $19 per cubic yard ($32.20 per ton - CLP) and $20 per cubic yard ($33.90 per ton -Arizona Trufflite). 2007 Mineral Report at 33; *see id.* at 28-33. The other four were selling pumice unfit for stonewashing garments due to the small particular sizes of their pumice (? 3/8") into the concrete aggregate and horticulture/landscaping markets for between $12.00 per ton (Hess Pumice Products) and $22.90 per ton ($13.50 per cubic yard - Glass Mountain). *Id.*

This 2006 "survey" by the FS shows laundry-grade pumice commanded a higher price than pumice not fit for laundry use and that laundry-grade pumice produced by CLP and Arizona Tufflite then sold at the same (or a slightly higher) price than Copar received for its 2006 bulk sales of laundry-grade pumice ($19.00 per cubic yard), but that it then received substantially more for its bagged pumice (i.e., $25.52 per cubic yard in 35-pound bags ($43.38 per ton) and $24.19 per cubic yard in 25-pound bags ($41.12 per ton). *See* ALJ Decision at 6,12. Moreover, the price received for small pumice (? 5/16") from its South Pit Mine for construction use, $9.50 to $13.50 per cubic yard, was comparable to prices reported by the FS for small pumice produced by the four other pumice producers it contacted. *Id.*

The FS did not update its 2006 pumice producer "survey" for the June 2010 contest hearing, whereas Copar proffered its updated prices for laundry-grade pumice to be sold from its El Cajete Mine. Copar entered into five contracts during 2008 and 2010, which Stebbins recognized were for 29,731 tons of laundry-grade pumice at an average price of $60.60 per ton. Stebbins Report, Appendix N. However, ALJ Heffernan refused to consider those contract prices, because two of the contracts ***250** were not in force at the time of the hearing and the others lacked a penalty clause if the purchaser refused to accept its contracted-for pumice. He therefore relied only on the 2006 FS ""survey" and data gleaned from sales that occurred between 2002 and 2007, which were roughly 3 years old at the time of the contest hearing, to find in 2011 that laundry-grade pumice sold in 2006 did not then command a premium over common pumice sold for common variety use. *See* ALJ Decision at 16-17.

****56** The Board has never before required a claimant to present contracts, much less contracts in force or that have penalty clauses, in order to establish the price its mineral material was likely to command in the market place. Moreover, locatability and discovery of a mineral deposit is determined not only before patent issues or lands are withdrawn from mineral entry, but also at the time of a contest hearing. I therefore find ALJ Heffernan erred in rejecting the 2008 and 2010 contract prices proffered by Copar and failing otherwise to consider comparative prices as they existed at the time of the contest hearing. I find these errors especially problematic because publicly available USGS data show that the value of pumice for common variety use declined by roughly half between 2006 (the year of the FS "survey") and 2010 (the year of the contest hearing). *Compare* 2006 Minerals Yearbook at 59.3 ($22.10 per ton for pumice sold for common variety use in concrete, building blocks, and for horticulture and landscaping) *with* 2010 Minerals Yearbook at 59.3 ($12.07 per ton for pumice sold for such common variety uses); *see* note 19, *supra*. Rather than remand for further proceedings, I find the record sufficient to decide this issue on *de novo* review.

The record shows Copar entered into five contracts for its sale of laundry-grade pumice at an average contract price of $60.60 per ton, after it was forced to suspend mining on the Brown Claims by the FS in late 2007. Comparing its contract prices to USGS data on pumice sold for common variety use shows it would command a significant premium over common pumice. The 2008 USGS survey of pumice producers concluded that 707,000 metric tons of pumice were sold for use in building block and concrete and for horticulture/landscaping use for $10,860,000 ($13.94 per ton), 2008 Minerals Yearbook at 59.3; its 2010 survey showed 368,000 metric tons were sold for such uses at an average price of $12.07 per ton, 2010 Minerals Yearbook at 59.3. Thus, laundry-grade pumice on the Brown Claims commanded a more than four-fold premium over common pumice sold for common variety uses in both 2008 and 2010 (i.e., $60.60 per ton vs. $13.94 per ton (2008 Minerals Yearbook) and $12.07 per ton (2010 Minerals Yearbook)), which is more than sufficient to satisfy the second prong of the Department's dual standard for determining distinct and special value under the Common Varieties Act.

251** ***II. WHETHER A VALUABLE MINERAL DEPOSIT CONTINUES TO EXIST ON THE BROWN CLAIMS

In order for mining claims to be valid, they must contain the discovery of ""valuable mineral deposits," which is determined by applying an objective standard: "[D]iscovered deposits must be of such a character that 'a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a

valuable mine'." *United States* v. *Coleman*, 390 U.S. 599, 602 (1968) (quoting *Castle v. Womble*, 19 L.D. 455, 457 (1894)); 30 U.S.C. §§ 22, 29 (2006); *see generally United States v. Miller*, 165 IBLA 342, 354-56 (2005).[ii] A logical compliment to this prudent man standard is a marketability test, because no reasonably prudent person would develop a mine unless the extracted minerals could likely be sold into a market "at a price higher than the costs of extraction and transportation." *United States v. Coleman*, 390 U.S. at 602; see, e.g., *United States v. Rannells*, 175 IBLA 363, 367-68 (2008);[jj] *Multiple Use*, 120 IBLA at 80; *United States v. Martinez*, 49 IBLA 360, 366-67, 371-74 (1980).[kk]

****57** The prudent man standard and its marketability test apply equally in determining whether a discovery was made or is subsequently lost, either because the claim is then played out or there has been a material change affecting whether it can be profitably mined. *See United States v. Martinek*, 166 IBLA 347, 418-19 (2006),[ll] and cases cited; *United States* v. *Garcia*, 161 IBLA 235, 242 (2004).[mm] Moreover, the Board has consistently recognized that "actual profitable mining operations are the best evidence of a valuable mineral deposit." *United States v. Guzman*, 18 IBLA 109, 121 (1974} [nn] citing *United States* v. *McKenzie*, 4 IBLA 98, 100-01 (1971),[oo] *see e.g., United States* v. *Freeman*, 179 IBLA 341, 348 (2010)[pp] (citing *Martinez*, 49 IBLA at 371); *United States v. Kribs*, 174 IBLA 375, 392 (2008),[qq] and cases cited; *Foresyth*, 100 IBLA at 233; *see also United States* v. *Willsie*, 152 IBLA 241, 264 (2000)[rr] ("[T]he best evidence of what a prudent man would do is what a prudent man has done."). In sum and at bottom, where there has been an allegedly material change affecting the profitability of an existing mine, it must be objectively shown that a prudent person would either continue mining the claim with a reasonable prospect of continuing to make a profit, or if mining had been suspended, mining could be resumed with a reasonable prospect that it would be profitable in the future.

The FS verified that Copar had discovered a valuable deposit of locatable laundry-grade pumice on the Brown Claims in 1995, which resulted in its approval of a 10-year mining plan for them. *See* Ex. G-8 (1995 Mineral Report). It is uncontroverted that Copar developed the El Cajete Mine pursuant to that plan by clearing, fencing, and removing overburden from the land, constructing facilities and access to the deposit, obtaining permits, and acquiring necessary mining and processing equipment to open a mine, as had been evaluated and verified by the ***252** in 1995. *Id.* at 5, 31-35. It is also uncontroverted that this mine produced over 100,000 tons of laundry-grade pumice and that the claims were being profitably mined when mining was suspended after the FS refused to extend Copar's approved plan and determined that these claims contained only non-locatable, common pumice. Thus, but for that erroneous common variety determination, as detailed above, its minerals reexamination would have addressed whether there had been a sufficiently material change in prices, costs, and/or markets to show that this deposit was no longer valuable for the production of laundry-grade pumice to stonewash garments or for any other uncommon variety use under the prudent man standard and its marketability test.

****58** The Contest Complaint charged that the Brown Claims do not contain a valuable deposit of "'block pumice' which occurs in nature in pieces having one dimension of two inches or more" and that is locatable by law. 30 U.S.C. § 611 (2006); *see* Government Brief at 12-13. Despite assuring Copar that this was what it was charging under its second charge, the Government radically expanded the scope of that charge at the 11th hour. Rather than evaluate whether a ""block pumice" deposit had been discovered on the Brown Claims, the Government provided Copar with a report by Stebbins on May 21, 2010, which evaluated whether laundry-grade pumice could be profitably mined on the Brown Claims. Stebbins and his report assumed that these claims had never been mined or developed and, therefore, evaluated whether an entirely new mine could be developed on them. Copar did not request a postponement of the hearing, electing instead to show that these and other assumptions made by Stebbins were in clear error and to proffer affirmative evidence showing it developed a paying mine on the Brown Claims under the 10-year plan of operations approved by the FS in 1997 and that the El Cajete Mine was profitable in 2007 and would be profitable if allowed to resume mining laundry-grade pumice. ALJ Heffernan was unpersuaded, found the Stebbins Report and testimony by Stebbins to be dispositive on whether a valuable mineral deposit existed on the Brown Claims, and therefore declared them invalid. Whereas the majority affirms his decision, I would set it aside (or reverse) for the reasons detailed below.

Stebbins evaluated the economics of mining the claims, but in doing so, he failed to consider the facts as they existed on the ground. For example, the El Cajete Mine existed, was fenced, cleared and permitted, overburden removed, a new mining plan submitted, all necessary equipment and facilities had been acquired and accounted for as depreciation, had been profitable for nearly 10 years, and was still profitable in November 2007 when mining was suspended on the Brown Claims. Since Stebbins assumed the claims were wholly undeveloped, he assumed it would take 3 years of effort and expense to open a new mine, which would include acquiring all new mining and processing equipment, constructing access and both ***253** on-site mining and off-site processing facilities, fencing, clearing, and removing overburden from the claims, preparing environmental documents, and obtaining necessary permits. As discussed, his software then estimated such a new mine

would have an accumulated debt burden of $3,731,041 for purchasing new equipment and other start up costs before any pumice was produced from the claims and that such a mine would be profitable only if it produced and sold at least 30,000 TPY of laundry-grade pumice. Stebbins Report at 13, 23-24; *see id.*, Appendices A and M.

****59** Copar focused on whether its discovery on the Brown Claims had been lost due to a change in circumstances since its discovery was verified by the FS in 1995. It therefore proffered evidence to show a paying mine had been developed on the claims, the El Cajete Mine had been profitable and continued to be profitable in late 2007 (when it was forced to suspend mining by the FS), and that it would be profitable in the future if allowed to resume mining operations. Thus, whereas Stebbins assumed it would take 3 years and $3.7 million to open an entirely new mine on these claims, Copar showed it could reopen the El Cajete Mine and resume mining in less than a month at a cost of less than $50,000 by using its current workforce and existing equipment, which had been fully paid for by early years' operating revenue and accounted for as depreciation on its tax return. *See* Tr. 1325, 1330-32, 1343, 1426-27, 1500 (Armstrong, Copar President); Tr. 1712-26 (Takala, accounting expert who prepared Copar tax returns). Whereas Stebbins also assumed a new miner would pay prevailing wages published by the Department of Labor for the State of New Mexico its employees for startup and mining operations, Copar showed it paid its workforce well above the minimum wage but considerably less than that paid under union contracts, which are used by the Department of Labor to identify prevailing wage rates under the Davis Bacon Act. *See United States* v. *Anthony*, 180 IBLA at 350-51, and cases cited; *United States v. Miller*, 138 IBLA at 276 (the Federal minimum wage represents labor cost "floor" paid by a prudent person).

It is uncontroverted that the El Cajete Mine opened in 1998 and was not only the dominant domestic producer of laundry-grade pumice, but also competing successfully in the Mexican laundry market, when it was forced to suspend mining in 2007. The best evidence of whether a paying mine could be developed is whether an existing mine was actually profitable. Caster (Copar's in-house accountant), Takala (an accepted accounting expert who prepared its tax returns), and Armstrong (Copar's president) all testified that producing laundry-grade pumice from the El Cajete Mine had been continuously profitable until it was forced to suspend mining in November 2007, with annual revenues consistently exceeding mining and processing costs by $5.65 to $12.25 for each ton of laundry-grade pumice produced, processed, and sold by Copar from 2004 through 2007. As the Government did not rebut this evidence, Copar's assumptions and estimates should be presumed true as they are supported by the record. *See Multiple Use*, 120 IBLA at 128 ("if the sworn testimony ***254** of a claimant or operator remains unrefuted and unchallenged, it is presumed to be true").

I am not persuaded, as is the majority, that equipment purchased and used to develop and operate the El Cajete Mine between 1997 and 2007 must be considered anew in deciding whether it contains a sufficient discovery to support continued or resumed mining, as this would invite serial mineral contests and require contestees to show repeatedly that their continued/resumed mining will generate sufficient revenue to reacquire/repurchase the same equipment over and over again in response to each such contest complaint. In my view, a claimant who developed a paying mine need only show that continued/resumed mining could reasonably be expected to be profitable. Disregarding previously paid-for equipment that is available to continue or resume mining is to skew that analysis by adding costs not relevant in determining whether the claims were lost due to an allegedly material change in market size, product prices, or mining/processing costs.

****60** I therefore find Stebbins and his report are wildly off the mark for determining whether Copar lost its verified discovery of a valuable mineral deposit and that ALJ Heffernan erred in using the Stebbins report and his testimony as conclusive evidence for him to declare these claims "invalid, null and void, for lack of valuable discoveries as of the 2010 hearing." ALJ Decision at 18. While the Board could reverse on de novo review of the evidence presented by Copar, I would set his decision aside for further proceedings, in which case the Government would be allowed properly to show that Copar lost its discovery on the Brown Claims. For example, it could develop evidence showing the El Cajete Mine was not profitable in 2007 and that if Copar were allowed to reopen the mine and resume mining the claims, it would not likely be profitable due to a material change in circumstances.[39]

James K. Jackson
Administrative Judge

Footnotes

[1] The exhibits admitted into evidence at the hearing are exceedingly voluminous. The Government's exhibits are contained in nine mostly 3-inch, 3-ring binders and claimants' exhibits fill four mainly 2-inch, 3-ring binders. However, the record is well organized and we therefore cite directly to the parties' exhibit number without enumerating a binder number. For clarity, we adopt the same exhibit abbreviations used below by the ALJ and the parties.

[2] However, the FS contested the validity of the remaining 19 claims, contending that the pumice on these remaining claims was not a "valuable mineral deposit" because it was not marketable in that any pumice from these claims would exceed the already declining demand for pumice in the gament finishing industry. On Aug. 18, 1999, Judge Heffernan determined that these 19 claims were null and void for failure to discover a valuable mineral deposit within the limits of each claim.

[3] The agency did not resample the deposit's physical characteristics; it relied on the 1995 samples to characterize the remaining pumice deposit as still containing 32 percent laundry grade material. Ex. G-32 at 16, 18; Tr. 581.

[4] In 2006, the FS commissioned a report from Peter W. Harben, Inc., an industrial mineral consulting firm, to review available market information regarding laundry grade pumice. *See* Ex. G-45 (2006 Harben Report). The Examiners took their general stone wash market facts from this report. *See* Ex. G-32 at 23, App. A.

[5] Arizona Tufflite sold pumice for aggregate at $20.00 per cubic yard, regardless of size. California Lightweight Pumice charged $19.00 per cubic yard, "and up." Ex. G- 32 at 29 (emphasis omitted). Glass Mountain, a California company, sold its pumice at $13.50 per cubic yard. It also sold a mixture of pumice and obsidian fractures, which was marketed as a "ready-mix" for lightweight concrete aggregate, for $28.25 per cubic yard. "Glass Mountain's construction customers value the constant proportion of lithics and pumice ... and perceive it as giving this product its particular value." Ex. G-32 at 30. Because the pumice was an aggregate, the FS considered it common variety, regardless of the price this particular deposit commanded in the market place, and used this price as the common variety pumice price ceiling. Tr. 644. Sierra Cascade, located in Oregon, sold its pumice for between $7.25 and $10.00, depending on the mineral's size. "Waste" from a New Mexico pumice mine operated by C.R. Minerals sold for $8.00 per cubic yard. Finally, the Examiners documented that Hess Pumice Products sold pumice from its Idaho mine as a landscape product for about $7.80 per cubic yard.
While the Examiners did not explicitly state in the Mineral Report that these numbers reflected bulk prices, the Examiners later confirmed that all prices were for bulk FOB mine sales in 2006. Tr. 274, 286.

[6] Deshusses holds a Ph.D. in environmental biotechnology for air pollution control and is a civil and environmental engineering professor at Duke University.

[7] With regard to marketability, a showing that merely establishes that a given market is receiving an adequate supply of the mineral in question to meet the demand is not a sufficient basis for concluding that supplies from another source are not marketable at a profit. *U.S. v. Willsie*, 152 IBLA 241, 270 (2000),[e] and cases cited.

[8] The Tenth Circuit applied regulations promulgated by the FS to implement the SRA, 30 U.S.C. § 611 (2006), as to mining operations conducted on National Forest System lands. Subpart C of 36 C.F.R. Part 228 governs the disposal of "mineral materials" on National Forest System lands. *See generally* 36 C.F.R. §§ 228.57 through 228.67. Subpart A of these regulations governs the removal of locatable minerals from National Forest System lands, *i.e.*, those minerals subject to location under the General Mining Law, including the "uncommon varieties" of minerals exempt from the Common Varieties Act. Subsection (c) of § 228.41 describes the types of minerals considered to be common variety:
e. GFS(MIN) 25(2000)
Mineral materials to which this subpart aplies. This subpart applies to mineral materials which consist of petrified wood and common varieties of sand, gravel, stone, pumice, pumicite, cinders, clay and other similar materials. Such mineral materials include deposits which, although they have economic value, are used for agriculture, animal husbandry, building, abrasion, construction, landscaping and similar uses.
36 C.F.R. § 228.41(c). Subsection (d) describes the types of minerals considered to be "uncommon variety":
Minerals not covered by this subpart. Mineral materials do not include any mineral used in manufacturing, industrial processing, or chemical operations for which no other mineral can be substituted due to unique properties giving the particular mineral a distinct and special value; nor do they include block pumice which in nature occurs in pieces having one dimension of two inches or more which is valuable and used for some application that requires such dimensions ....
Id. § 228.41(d). Subsection (e) indicates that the "use" of a common variety mineral could potentially transform it into an "uncommon variety": "[a] use which qualifies a mineral as an uncommon variety under paragraph (d) overrides classification of that mineral as a common variety under paragraph (c) of this section." *Id.* § 228.41(e)(2).

[9] Passages herein attributed to the FS are from documents quoted in the Tenth Circuit opinion.

[10] Copar argued that the Board's opinions in *U.S. v. Multiple Use, Inc.*, 120 IBLA 63 (1991),[f] and ***Mid-Continent*** *Res., Inc.*, 148 IBLA 370 (1999)[g] refute the Government's position that it "may regulate or restrict the actual end-uses of uncommon variety

materials." 603 F.3d at 797. Copar's premise was that +3/4" pumice was uncommon variety regardless of the end use. In rejecting Copar's argument, the Tenth Circuit stated that the Board had applied the *McClarty* standards, whereas its concern was with an FS "regulation that does not wholeheartedly embrace the *McClarty* standard." *Id.* The Tenth Circuit noted that in promulgating its regulation, "the Department of Agriculture recognized that *McClarty* 'has been regarded as definitive and ... has provided a broad framework."' *Id.* (quoting 55 Fed. Reg. 51700 (Dec. 17,1990)). The FS observed that "[u]se of the standards established in the *McClarty* decision leaves a number of unanswered questions for the operator and the Forest Service." *Id.* However, the Tenth Circuit made clear that regulation of the end use of the El Cajete pumice was not prohibited by, or inconsistent with, the *McClarty* standards.
f. GFS(MIN) 50(1991)
g. GFS(MIN) 40(1999)

11 We make no observation as to whether the FS would agree that use of +3/4" pumice in the biofilter industry would meet the definition of uncommon variety pumice under FS regulations. There is nothing in the record to suggest what position FS would take on that issue.

12 In *Chainman*, the Board observed: "There is a general rule that where relevant information 'is in the possession of one party and not provided, then an adverse inference may be drawn that such information would be harmful to the party who fails to provide it."' 182 IBLA at 360 n.4 (quoting *Clay v. United Parcel Serv., Inc.*, 501 F.3d 695, 712 (6th Cir. 2007)). The Board follows this rule. *Twin Arrow, Inc.*, 118 IBLA 55, 59 (1991);[k] *Patricia Alker, 79* IBLA 123,127 (1984).[l] In *Cumberland Reclamation Co. v. Sec'y, Dep't of the Interior*, 925 F.2d 164 (6th Cir. 1991), a mine operator claimed to be exempt from the requirements of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (2006), because production of coal was incidental to the production of other minerals, yet the operator did not provide evidence of the amount of coal produced and the amount of other minerals sold, the Court adopted the Board's view that a mine operator's failure to produce evidence of its production "speaks volumes." 925 F.2d at 168, *aff'g* 102 IBLA 100 (1988)[m]
k. GFS(0&G) 12(1991)
l. GFS(0&G) 76(1984)
m. GFS(MIN) 58(1988)

13 Tafoya testified that low demand had decreased the mineral's cost and that this price depreciation converted the once uncommon stone into a common variety mineral because it no longer commanded a higher price that reflected its unique property. She claimed that prices for locatable laundry grade pumice had to "far exceed" the price of common-variety pumice. Tr. 474. Her opinion was that the price spread between sale prices of Copar's laundry grade material and sales prices of other companies simply was not enough to qualify Copar's laundry grade pumice as an uncommon variety mineral. She therefore concluded that the claims were invalid. *Id.*

14 Copar argues that Judge Heffernan erred in construing *Multiple Use* to require a "substantially higher, a significantly higher," price for uncommon variety pumice than for common variety pumice. For purposes of reviewing the record in this case, however, we need not articulate a bright-line test for purposes of applying the "higher price" test of *McClarty*. Stating that a price multiple of three, four, or seven times the price for common variety would be of little meaning herein, given Judge Heffernan's finding that some 8 of 17 other common variety products from Western pumice producers sell for the same or higher prices than Copar's laundry grade pumice. As Tafoya stated, the price range for Copar's laundry grade pumice "would not distinguish the Copar stonewash pumice ... from its common grade." Tr. 622.

15 Copar challenges these calculations, asserting that "the $15.50 price was only for small, pick-up load quantities of pumice and is not representative of the price of general run-of-the-mill pumice," that "the average price of all Copar's construction pumice in May 2006 was only $11.06 [per cubic yard]," and that it "actually received an average of $21.28 [per cubic yard] for its laundry pumice." SOR at 23. Copar's figures do not undermine Judge Heffernan's conclusion that the El Cajete stone wash pumice sold for prices within the range of all common variety pumice sold by the Western producers.

16 If not otherwise defunct or invalid, this mistake of fact may render the contracts invalid, as asserted by the Government. The fact that the contracts are for the sale of block pumice raises a number of questions, foremost of which is why Copar would enter into such contracts, having never mined, processed, or sold block pumice as a product. Bell, Copar's former Operations Manager, expressed doubt that the contracts could be fulfilled (even if valid), or that Copar could economically mine the material specified in the contracts. He testified that Copar's normal practice was to crush the +2" pumice at the site by driving the loaders over it and then re-screening it. Tr. 364. He stated further that Copar could produce less than 50 cubic yards of +2" pumice in the course of a month, and could not provide several thousand cubic yards of +2" pumice per year. Tr. 365-66.

17 We express no opinion as to whether the FS would agree with Copar's position that laundry grade pumice used in the biofilter industry is locatable.

18 The fact that prospective purchasers may have closer sources of supply has long been recognized as important in determining the

present marketability of a mineral from a mining claim. *See U.S. v. Ideal Cement Co.*, 5 IBLA 235, 242-43, 79 I.D. 117, 121 (1972).[dd] In that case, the Board found that a claimant had not established that limestone from claims in Alaska was presently marketable because the prospective market in Seattle had closer sources of supply in British Columbia. *Id.* In affirming this Board, the Ninth Circuit stated: "The test of marketability is not satisfied by the existence of a possible market for the mineral at some future date under altered economic conditions. ... A claimant cannot rely on speculative future marketability to supply present value." *Ideal Basic Indus., Inc. v. Morton*, 542 F.2d 1364, 1370 (9th Cir. 1976) (citations omitted).

dd. GFS(MIN)16(1972)

a GFS(MIN) 278(1981)

b GFS(MIN) 116(1998)

c GFS(MIN) 53(1997)

d GFS(MIN) 49(1994)

h GFS(MIN) 100(1984)

i GFS(MIN) 4(2006)

j GFS(0&G) 3(2012)

n GFS(MIN) 20(1988)

o GFS(MIN) 30(2008)

p GFS(MIN) 5(2006)

q GFS(MIN) 24(2009)

r GFS(MIN) 19(2009)

s GFS(MIN) 33(2005)

t GFS(MIN) 170(1980)

u GFS(MIN) 49(1994)

v GFS(MIN) 74(1974)

w GFS(MIN) 49(1974)

x GFS(MIN) 53(1997)

y GFS(MIN) 70(1994)

z GFS(MIN) 20(1988)

aa GFS(MIN) 30(1998)

bb GFS(MIN) 21(1987)

cc GFS(MIN) 12(1990)

19 These yearbooks present national survey data published by the Bureau of Mines (until the 1990s) and more recently by USGS. Each yearbook summarizes data on pumice production and sales to calculate average pumice prices for common variety pumice in

building block, concrete, aggregate, cleaning and scouring compounds, and for horticulture and landscaping use. USGS separately identified data on pumice produced and used by stonewash laundries, but stopped doing so in 2003 when it was placed in the "other" use category. *Compare* 2003 Minerals Yearbook at 59.1 to 59.3 *with* 1994 Minerals Yearbook (Pumice and Pumicite).

20 Claimants filed suit for the taking of property rights in the Brown Claims, plus 19 other mining claims in the JNRA that were the object of a mining contest that was appealed and docketed by the Board as IBLA 2000-3. *See* 16 U.S.C. § 460jjj-2(a)(2) (2006); *Cook* v. *United States*, 42 Fed. Cl. 788, 794 (1999); *Cook* v. *United States*, 37 Fed. Cl.. 435, 446-47 (1997). The parties settled their differences in both proceedings on Apr. 4, 2011, with the United States agreeing to pay interest, costs, attorneys fees, and just compensation for taking all 23 of these mining claims, and Copar agreeing to retain only the Brown Claims "as unpatented mining claims subject to all pertinent statutes and regulations." Ex. G-11 at 1. Although the United States paid Copar a total of $3,911,838 to settle those matters, the expert report proffered by Copar showed its common variety pumice on just the Brown Claims was valued at nearly $3.6 million, excluding the value of its still valid mining claims. *See* Ex. G-20.

21 Based on that finding and recommendation, the FS examiners did not consider whether Copar had developed a paying mine or that it was then selling laundry-grade pumice from the El Cajete Mine at a profit.

22 Copar filed a "revised Plan of Operations to complete mining operations at the El Cajete Pumice Mine" in December 2007 and a separate plan for "El Cajete No. 2 Pumice Mine" in January 2008, but the FS suspended processing of both when this mining contest was initiated. Ex. C-7 at 1; Ex. C-8 at 1.

23 In addition to live testimony on each of these reports, Richard Bell, a former Copar operations manager, testified that the Espanola plant primarily processed pumice from the El Cajete Mine and had significantly reduced its processing costs by purchasing new equipment that eliminated the need for 8 workers at the plant, which was confirmed by Copar witnesses. *See* Tr. 347-99 (Brown), 1541-53 (Velazco). Marc A. Deshusses, an engineering professor at Duke University, also testified for the Government to address the market for using pumice in biofilters. While he noted pumice is superior to most other natural materials for that use, Deshusses stated there was not much of a market for that use. Tr. at 1161, 1193, 1209.

24 As discussed below, Gore recently testified in a trespass action against Copar that all of its sales to Garcia were ultimately sold to stonewash laundries.

25 Although the FS database showed Garcia purchased 16,829 tons of laundry-grade pumice over those 2 years, they allocated only 2,318 of those tons to stonewash laundry sales because they assumed "a significant quantity of the material was going to unidentified markets other than stonewashing." 2010 Harben Report at 26.

26 The 2010 update also revised the 2006 estimate of the price paid for Copar pumice in 25 and 35 pound bags because it assumed each bag held more than 25 or 35 pounds and had higher bagging and palletizing costs, which lowered their earlier estimates from $57 to $15 per ton (25-pound bags) and from $47 to $27.50 per ton (35-pound bags). *Compare* 2006 Harben Report at 46, 49 *with* 2010 Harben Report at 31.

27 These other scenarios were based on differing particle sizes, degradation rates, and production levels (Appendices B-I), third-party processing and hauling (Appendices J- L), and a "break even" scenario of 30,000 TPY (Appendix M).

28 His report states Davis-Bacon wages were then $19.21 to $22.27 for equipment operators, $28.10 for mechanics, and $15.44 for laborers. Stebbins Report at 20.

29 Stebbins presented an additional scenario at the hearing that was based on Copar contracts for a total of 29,731 tons of laundry-grade pumice at an average price of $60.60 per ton that would generate gross revenues of $1,802,062 and had been entered into after the El Cajete Mine was forced to stop mining in November 2007. *See* Tr. 962-63; Ex. G-58 (Appendix N). Based on assumptions he made in reading these contracts, his model estimated net operating revenue of only $89,193 per year under that scenario.

30 Copar largely relied on Garcia and other distributors to sell its laundry-grade pumice, which was done to minimize liability "if something should go wrong with the rock in the wash." Tr. 1351 (Armstrong).

31 Caster did not include the cost of purchasing or renting equipment at the Espanola plant in her summary of expenses for processing laundry-grade pumice. Tr. 1664-66, 1681-82.

32 Since common variety pumice from the South Pit Mine was processed at its Espanola and San Ysidro plants, none of their income or operating costs were included (or allocated to the production of laundry-grade pumice) in her summaries.

33 Since Copar had all the equipment it would need to resume mining the Brown Claims, which had been fully depreciated during

prior tax years, Armstrong did not include an added capital cost for that equipment in her estimates. Tr. 1362-66; *see* Ex. C-10, Appendix A; Tr. 1573-92 (equipment condition, purchase dates, and repair histories of Copar equipment); *but see* Tr. 1792-94 (Stebbins).

34 ALJ Heffernan found Copar sold pumice from the South Pit Mine for common variety use at an average of $13 per cubic yard ($22.10 per ton) in 2007, whereas Harben estimated that Copar was then selling laundry-grade pumice from the El Cajete Mine for $15 per ton (in 25-pound bags) and $27.10 per ton (35-pound bags). *See* ALJ Decision at 14-15; 2010 Harben Report at 31. ALJ Heffernan did not consider the market or substantially higher price paid by PPC for using Copar pumice in its biofilters, apparently because he found it was an insufficient, stand-alone market for its pumice. *See* ALJ Decision at 16.

35 White Vulcan No. 2 had a 20% yield of pumice suitable for laundry use, whereas the El Cajete Mine yield is substantially higher (ranging from 30% to 60%), which may explain why all but one other mine left that market to Copar and suggests (if not demonstrates) that this deposit has a distinct and special value based on its high yield and ability to produce laundry-grade pumice at a lower cost with higher profits than its former competitors. *See McClarty*, 408 F.2d at 909; *U.S. v. Knipe*, 170 IBLA 161, 181-84 (2006).[hh]

hh. GFS(MIN) 24(2006)

36 The Board found the pumice price for use by laundries was 10 times that paid for pumice used as aggregate. *Multiple Use*, 120 IBLA at 102 (citing 1987 Minerals Yearbook at 714). Thus, regardless of whether stonewashing was a common or uncommon variety use or any pumice could be so used, proof of unique properties for such use was not required because the record showed that the market was willing to pay a 10-fold premium for any pumice it found suitable to stonewash garments. *See also id.* at 78-79.

37 The USGS reported the following pumice sales for 2006: $26,500,000 for 1,146,000 tons used in building blocks ($23.10 per ton), $2,340,000 for 158,000 tons used in horticulture and for landscaping ($14.80 per ton), and $648,000 for 33,000 tons used in concrete ($19.65 per ton). *See* 2006 Minerals Yearbook at 59.3. Since each such use is clearly a common variety use, these data show that a total of 1,337,000 tons of pumice were sold for $29,488,000, which represents an average pumice price of $22.05 per ton for these common variety uses.

38 CLP is the only other domestic producer of laundry-grade pumice; Arizona Trufflite mines the deposit that was determined to be of uncommon variety in *Multiple Use*, but it left that market in 2000. 2007 Mineral Report at 28-30.

39 I would therefore deny Copar's motions to remand and to supplement the record as moot.

ee GFS(MIN) 20(1988)

ff GFS(MIN) 50(1991)

gg GFS(MIN) 178(1982)

ii GFS(MIN) 21(2005)

jj GFS(MIN) 30(2008)

kk GFS(MIN) 210(1980)

ll GFS(MIN) 33(2005)

mm GFS(MIN) 16(2004)

nn GFS(MIN) 2(1975)

oo GFS(MIN) 36(1971)

pp GFS(MIN) 16(2010)

qq GFS(MIN) 20(2008)

rr GFS(MIN) 25(2000)

End of Document